

Montana Guide to the Indian Child Welfare Act (ICWA) and the Montana Indian Child Welfare Act (MICWA) in Dependent Neglect (DN) Cases

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Legal Disclaimer

This guide does not provide legal advice or opinion and is not intended to do so. It only conveys general information regarding the impact of the Indian Child Welfare Act (ICWA) and the Montana Indian Child Welfare Act (MICWA) on dependent neglect (DN) cases in Montana.

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Introduction

Indian Child Welfare Act (ICWA)

Indian children were historically removed from their families, Tribes, land, and culture and placed in boarding schools, foster homes, and adoptive placements with non-native families. These actions caused irreparable harm to Indian children, families, and Tribes. Indian children died in boarding schools and families were torn apart. Tribes lost their most important resource, their children.

In 1978, the United States Congress enacted the Indian Child Welfare Act (ICWA) due to these historical practices and the alarmingly high removal rates of Indian children from their homes. ICWA refers to Native Americans as American Indians and Alaska Natives. ICWA was intended to protect the best interest of Indian children and to promote the stability and security of Indian Tribes and families. *25 USC § 1902*. ICWA established higher standards for the efforts required of state child protection agencies and the review processes conducted by state courts. Placement preferences in foster care and for the adoption of Indian children were designed to emphasize family, culture, community, and Tribes.

ICWA is a federal act, or set of laws, that applies to dependent neglect (DN) cases in Montana District Courts and state courts across the country. Federal regulations provide clarification and direction for ICWA. In 2016, the United States Department of the Interior, through the Bureau of Indian Affairs (BIA), provided a “Guideline for Implementing the Indian Child Welfare Act,” referred to in these materials as the BIA Guidelines.

Montana Indian Child Welfare Act (MICWA)

In 2023, a set of Montana laws was enacted, known as the Montana Indian Child Welfare Act, or MICWA. *Title 41, Chapter 3 Child Abuse and Neglect, Part 13 Montana Indian Child Welfare Act, MCA*. MICWA is a state act similar to federal ICWA. It offers the same types of protections for Indian children, their families, and Tribes. The 2025 Montana legislature removed a previous sunset clause from the act, thereby extending MICWA indefinitely. *SB 147 (2025)*.

In 2023, at the time of MICWA’s enactment, the Montana Legislature indicated that “the state is committed to protecting the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the child, or the interests of the child’s Tribe.” *MCA 41-3-1302(1)*. The Legislature further stated that “when placement away from the parent or Indian custodian is necessary for the Indian child’s safety, the state is committed to a placement that reflects and honors the unique values of the Indian child’s tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the Indian child’s Tribe and tribal community.” *MCA 41-3-1302(2)*.

MICWA is designed to promote the ideals of ICWA in Montana. Where there are slight differences between MICWA and ICWA, those differences are noted throughout this guide. Additionally, a MICWA specific section of this guide addresses these differences.

The Purpose of this Guide

Some progress has been made toward reaching the goals of ICWA. The establishment of MICWA demonstrates Montana's commitment to the principles of ICWA. However, a great deal of work remains to be done to meet the goals of ICWA. Indian children in Montana and throughout the United States continue to be removed from their homes at a rate far higher than the general population. In Montana, Native Americans make up less than 10% of the total population of children. However, in 2023, more than a third of children in Montana foster care were Native Americans. <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/montana.html>

This guide aims to provide a better understanding of ICWA and MICWA as these acts apply to DN cases in Montana, with the goal of delivering better outcomes for Indian children and their families. It is not only the letter of these laws that matters, but the spirit of ICWA, which needs to be actively considered in all DN cases involving an Indian child.

For more information concerning ICWA and MICWA, visit the Montana Court Improvement Program (CIP) website at cip.mt.gov, where you will find a link to eLearning courses, including a guide about ICWA and MICWA.

Indian Child and ICWA Status

Indian Child

For ICWA and MICWA to apply to a DN case, the child must be an "Indian child" as defined by these acts. Under ICWA and MICWA, an Indian child is an unmarried person under the age of 18 who is either:

- A member of a federally recognized Tribe, or
- Eligible for membership in a federally recognized Tribe and the biological child of a member of a federally recognized Indian Tribe. 25 U.S.C. § 1903(4); MCA 41-3-1303(8).

This legal definition means that some children who self-identify as Native American may not qualify as Indian children through ICWA and MICWA.

Diligent Efforts to Inquire into ICWA Status

From a family's initial contact with the Montana Child and Family Services Division (CFSD) and throughout a DN case, the state must make inquiries to determine whether a child is an Indian child as defined by ICWA and MICWA. These acts establish a higher level of effort that must be made to prevent the removal of Indian children from their homes. Thus, identifying Indian children at the initial phase of an investigation is essential.

CFSD must exercise “due diligence” when seeking to determine if a child is an Indian child. *In re: S.R. and C.R., 2019 MT 47, ¶ 17-18; 25 C.F.R. § 23.107(b)(1); MCA 41-3-1306(1)*. ICWA status affects all aspects of a DN case, from the initial investigation and possible removal to any potential adoption. Thus, at each hearing, the judge should ask whether the participants know or have reason to know if the child is an Indian child.

The judge must determine whether CFSD exercised due diligence to identify and work with all possible Tribes to determine the child’s membership or eligibility status. The judge should order the parties to inform the court if they subsequently receive information indicating there is reason to know the child is an Indian child. *25 C.F.R. § 23-107; MCA 41-3-1306(3)*. Diligent efforts to determine whether a child is an Indian child should continue as long as there is a question whether the child may be an Indian child.

The parties should be prepared to discuss ICWA eligibility at each court appearance, conference, and meeting. The sooner ICWA status is conclusively resolved, the better. However, additional information may be discovered during a case that could potentially change ICWA status. For example, something could come to light about a child having Native American ancestry that was previously unknown. That child might be eligible for tribal membership, requiring further inquiry. Therefore, ICWA status must be continually evaluated throughout the case. An accurate determination must be made whether a child is an Indian child before or during a DN case. This process may require a significant amount of work. The Montana Supreme Court has made it clear that DN cases should, at the very least, not proceed to termination of parental rights until ICWA status has been entirely resolved. *In re: L.D., 2018 MT 60*.

Reasons to Know a Child Is an Indian Child

If there is a reason to know a child is an Indian child, it is essential for a Montana District Court and CFSD to diligently follow through with an investigation of ICWA status and treat the child as an Indian child until a conclusive determination can be made. Courts determine if there is a reason to know a child is an Indian child based on information provided by the parties and participants. CFSD inquires about ICWA status throughout the case and passes that information on to the court, as well as the County Attorney, Deputy County Attorney, or Assistant Attorney General. District Courts often interpret “a reason to know” to mean that if a child may be an Indian child, the investigation of ICWA status should continue until it is resolved.

Reasons to know a child is an Indian child are:

- Any participant in the proceeding, Indian Tribe, organization, or agency informs the District Court that the child is an Indian child,
- Any participant in the proceeding, Indian Tribe, organization, or agency informs the District Court that it has discovered information indicating that the child is an Indian child,

- The child gives the District Court reason to know they are an Indian child,
- The domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village,
- The child is or has been a ward of a Tribal Court, or
- Either parent or the child possesses an identification card indicating membership in an Indian Tribe. *25 C.F.R. § 23.107(c); MCA 41-3-1306(5).*

Federally Recognized Tribes

American Indian and Alaska Native Tribes within the United States are sovereign governments, meaning they have the right to govern and establish their own laws. The United States Constitution recognizes Indian Tribes as distinct governments. *U.S. Const., Art. I, Sect. 8.* Thus, Tribes have the right to determine who is a member or eligible for membership in their Tribe.

Federally recognized Tribes include all American Indian and Alaska Native Tribes located within the United States, which the federal government formally recognizes. Federally recognized Tribes determine whether a child or parent is a member or eligible for membership in their Tribe. Each Tribe decides how these determinations are made for their Tribe and may use different criteria for making these determinations. Montana District Courts and CFSD cannot decide on their own whether a child is a member or eligible for membership in a Tribe. CFSD must seek verification of membership or eligibility status from all possible Tribes. The Tribes decide if the child is a member or eligible for membership. They should convey that information to CFSD, which then reports to the District Court. A tribal determination of membership eligibility is conclusive as a matter of law. *In re: L.D., 2018 MT 60 ¶ 14; 25 C.F.R. § 23.108(b); MCA 41-3-1306(7).*

Montana is home to several reservations and federally recognized Tribes:

- Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community of the Fort Belknap Reservation
- Assiniboine and Sioux Tribes of the Fort Peck Reservation
- Blackfeet Nation of the Blackfeet Reservation
- Chippewa Cree Tribe of the Rocky Boy's Reservation
- Confederated Salish and Kootenai Tribes of the Flathead Reservation
- Crow Nation of the Crow Reservation
- Little Shell Tribe of Chippewa Indians of Montana
- Northern Cheyenne Tribe of the Northern Cheyenne Reservation

ICWA and MICWA apply to American Indian and Alaska Native children from any federally recognized Tribes, whether the Tribe is from Montana or not. If there is reason to know a child may be an Indian child, CFSD must reach out to all potential federally recognized Tribes, whether those Tribes are located in Montana or elsewhere in the United States. There are currently 574 federally recognized Tribes in the United States. That number could increase as

tribal entities seek federal recognition. A current and complete list of federally recognized Tribes can be found in the Federal Register. Most recently, the Little Shell Tribe of Chippewa Indians of Montana became the 574th federally recognized Tribe in 2019.

ICWA and MICWA do not apply to First Nations that are only recognized by the Canadian government or native tribal entities recognized by other foreign governments. However, Montana and its courts should respect all tribal relations and cultural backgrounds in every DN case. Native Americans are not the only people who experience inequities and disproportionately high rates of children being removed from their homes. Montana's policy is to "ensure that whenever removal of a child from the home is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate." *MCA 41-3-101(f)*. Thus, everyone's unique background should be respected and appreciated.

While Verification of ICWA Status is Pending

If there is reason to know a child may be a member of a federally recognized Tribe or eligible for membership, the child should be treated as an Indian child unless and until the Tribe or Tribes determine the child is not an Indian child under ICWA. *In re: S.R. and C.R., 2019 MT 47, ¶ 17; 25 C.F.R. § 23.107(b)(2)*. In other words, a child should be treated as an Indian child if there is a reason to believe they are. While awaiting tribal verifications, the case should be treated as an ICWA case. The final determination should be made on the District Court's record when confirmation of ICWA status is received from all potential Tribes. A reason to know a child is an Indian child will continue to exist until all possible Tribes have responded. *In re: L.D., 2018 MT 60 ¶ 11-17*.

To determine a child's ICWA status, CFSD must use due diligence to identify all federally recognized Tribes of which the child may be a member or eligible for membership. *25 C.F.R. § 23.107(b)(1); MCA 41-3-1306*. Due diligence must be considered on a case-by-case basis. However, the process should minimally involve efforts to speak with age-appropriate children and their immediate and extended family to determine if they have any Native American heritage and, if so, which Tribes may be involved. Efforts need to be made to contact all potential Tribes. A search of Tribes within a tribal ancestral group should be considered when no specific Tribe is designated. It is a best practice for CFSD to contact the designated ICWA agent or agents of the possible Tribe or Tribes directly by phone and email. Multiple requests for verification may be required as part of due diligence. A duty to inquire about ICWA status continues throughout a DN case.

"When there is reason to know that a child may be eligible for tribal enrollment, it is the Department's (CFSD) duty and burden to diligently investigate, provide formal notice to the suspected Indian Tribes or the Secretary of the Interior, and obtain a conclusive tribal determination of a child's eligibility for tribal membership." *In re: S.R. and C.R., 2019 MT 47, ¶ 18*. When there is a reason to know a child may be an Indian child, written confirmation from

the Tribe or Tribes concerning ICWA status should be filed with the District Court. *In re: D.E. and A.E.*, 2018 MT 196, ¶ 26-29.

Child Custody Proceedings and Notice Requirements

ICWA and MICWA establish legal notification requirements for parents, Indian custodians, and Tribes in child custody proceedings.

Child Custody Proceedings

ICWA and MICWA apply to child custody proceedings when an Indian child, as defined by these acts, is involved. Child custody proceedings include any action, other than emergency proceedings, that may result in a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 C.F.R. § 23.2; MCA 41-3-1303(3).

Indian Custodian

An Indian custodian has the same rights as a parent to be notified about child custody proceedings.

“An Indian custodian is an Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent.” 25 U.S.C. § 1903(6), MCA 41-3-1303(11). An Indian custodian might be a relative or tribal member with custody of a child through tribal or state law. However, an Indian custodian could be caring for an Indian child through less formal means, like tribal customs or temporarily through permission from the child’s parents. The term Indian custodian should be broadly interpreted to include all Indian persons caring for an Indian child through legal orders, customs, and parental permission.

Indian custodians have rights under ICWA and MICWA similar to parents due to their crucial role in the lives of Indian children. Efforts must be made to identify and locate Indian custodians. Like parents in a DN case, Indian custodians have the right to be appointed an attorney if they are indigent. 25 U.S.C. § 1912(b); MCA 41-3-425(2)(c); MCA 41-3-1316.

There are, however, some differences between the rights of parents and Indian custodians. For instance, an Indian custodian cannot prevent a transfer of jurisdiction from a Montana District Court to a Tribal Court like a parent can. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117; MCA 41-3-1310(5). Also, while the District Court may consider an Indian custodian’s request for a non-preferred placement of an Indian child, it is not specifically enumerated as one of the bases for good cause to depart from placement preferences. A parent’s request for a non-preferred placement is explicitly enumerated as one of the reasons a court should consider in determining if good cause exists to depart from placement preferences. 25 C.F.R. § 23.132(c); MCA 41-3-1329(8)(c)(i).

Notice to Parents, Indian Custodians, and the Tribe

ICWA and MICWA requirements differ regarding how to provide required notices to parents, Indian custodians, and Tribes in DN cases.

ICWA sets a minimum standard that notification of involuntary child custody proceedings seeking foster placement or termination of parental rights should be provided to the parents, Indian custodians, and the Tribe by registered or certified mail. *25 U.S.C. § 1912(a)*, *25 C.F.R. § 23.11(a)*. Child custody proceedings requiring formal notification include non-emergency foster care placement hearings and terminations of parental rights hearings. If the state seeks termination of parental or Indian custodian rights, additional notice must be provided to the parents, Indian custodians, and the Tribe. This notice is required, even though there was a previous notification about foster care placement hearings. *BIA Guidelines, D.1, at p. 31; MCA 41-3-1311(1)*.

A return receipt for the registered or certified mail notice must be requested. The County Attorney, Deputy County Attorney, or Assistant Attorney General maintains copies of the notice and the return receipts. Copies of those documents must be filed with the District Court. *25 C.F.R. § 23.111(a)(2)*. Tribes are generally served by registered or certified mail with a return receipt requested.

However, in Montana DN cases, state law provides a higher standard for notice to parents and Indian custodians by requiring personal service. *MCA 41-3-422(7)*. This notice requirement applies to both ICWA and non-ICWA cases. Proof of that personal service should be provided to the District Court. *MCA 41-3-422(6)(a)*. Personal service generally means that the parents and Indian custodians are served with the court documents in person. MICWA attempts to clarify that parents and Indian custodians, like all parents or guardians in DN cases, must be served personally or by alternative means of personal service, like publication, when actual personal service cannot be accomplished. *MCA 41-3-1311(2)(e)*.

According to MICWA, personal service of parents and Indian custodians takes the place of service by certified or registered mail since it constitutes a higher standard for service of process. *MCA 41-3-1311(2)(e)*. ICWA requires that, where state law provides a higher standard of protection to the rights of parents or Indian custodians than the rights provided under ICWA, the court must apply the higher state standard. *25 U.S.C. 1921*. Personal service is generally considered a higher standard than mail service. However, federal regulations state that personal service may occur in addition to service by certified or registered mail, but personal service does not replace the service requirement by mail. *25 C.F.R. 23.111 (c)*. Thus, it is unclear what the requirements are for the service of parents and Indian custodians in Montana. It may be safest to serve them both personally and through certified or registered mail.

MICWA requires the state to notify the Indian child's Tribe concerning all petitions filed before the District Court, not just the initial petition or a later petition to terminate parental rights, as

required by ICWA. Through MICWA, notice of additional petitions must be sent to the Tribe or Tribes by first-class mail. *MCA 41-3-1311(2)(d)*.

It is a best practice to keep the Tribe or Tribes informed about all proceedings during a DN case, which may include additional and less formal means of notification, such as emails, texts, and phone calls.

Timing of Notice

ICWA and MICWA provide 10 days from receipt of the notice for the parents, Indian custodians, or the Tribe to respond to such notice. No child custody proceeding can be held during those 10 days. Such notice is sometimes referred to as the 10-day notice requirement. The parents, Indian custodians, or the Tribe could also request an additional 20 days to prepare for the child custody proceeding. *25 U.S.C. § 1912(a); MCA 41-3-1311(3)*. Thus, child custody proceedings in ICWA cases may be delayed to allow parents, Indian custodians, and the Tribe to prepare.

When a parent, Indian custodian, or an Indian child's Tribe cannot be identified or located, notification must be sent to the Secretary of the Interior by serving the Regional Director of the Bureau of Indian Affairs (BIA). BIA has 15 days to locate and notify the parents, Indian custodian, or Tribe about the upcoming child custody proceeding. *25 U.S.C. § 1912(a); MCA 41-3-1311(2)(c)*. Upon receiving the notification, BIA should seek to identify and locate the parents, Indian custodians, and Tribe. BIA should provide information regarding their efforts and could request more time to complete their search. *25 C.F.R. § 23.11(c)*. In practice, it is unusual for BIA to respond in this manner.

After the termination of their rights, parents and Indian custodians are no longer parties to a DN case in the District Court. Thus, there is no need to notify them after the termination of their rights. However, it is recommended that the Tribe receive appropriate notification of proceedings involving pre-adoptive placement or adoption after the termination of parental or Indian custodian rights. *BIA Guidelines, D.1, at p. 31*.

Information in Notices

The notification must provide information about the pending proceedings, contacts, and rights, including the right to intervene as a party. *25 U.S.C. § 1912(a), 25 C.F.R. § 23.11(a), 25 C.F.R. § 23.111*. Indian custodians and the child's Tribe have a right to intervene in a DN case. However, in Montana, Indian custodians are generally treated as parties from the beginning of a DN case, without having to file a motion to intervene. Tribes decide whether to intervene as a party on a case-by-case basis.

Even if a Tribe chooses not to intervene, it is recommended that the state notify and consult with the child's Tribe about:

- Hearings in a DN case,
- Any change in the child's placement,

- Any change in the permanency or concurrent plan, and
- Any transfer of jurisdiction. *BIA Guidelines, D.1, at p. 31.*

The notice must be written in clear and understandable language and include the following:

- The child's name, birth date, and birthplace,
- All names that are known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers if known,
- If known, the names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents,
- The name of each Tribe in which the child is a member or may be eligible for membership if a biological parent is a member,
- A copy of the petition or other documents by which the child custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing,
- The name of the petitioner and the name and address of the petitioner's attorney,
- A statement setting out the right to intervene for Indian custodians and the Tribe in the proceedings,
- Information that, if the child's parent or Indian custodian is unable to afford an attorney based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel,
- Information that there is a right to be granted, upon request, of up to 20 additional days to prepare for the child custody proceedings,
- A statement setting out the right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster care placement or termination of parental rights proceeding to Tribal Court as provided by *25 U.S.C. § 1911 and 25 C.F.R. § 23.115*,
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified,
- The potential legal consequences of the child custody proceedings on the future parental and custodial rights of the parents or Indian custodian, and
- A statement that all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA. *25 C.F.R. § 23.111; MCA 41-3-1311(4).*

Emergency Proceedings

The 10-day notice requirement for parents, Indian custodians, and Tribes does not apply to emergency proceedings because emergency hearings are not child custody proceedings as defined by ICWA and MICWA. *25 C.F.R. § 23.2; MCA 41-3-306(7) & (8)*. Thus, formal notice is not required before holding an emergency removal hearing. However, this lack of formal notice does not mean attempts to inform parents, Indian custodians, and Tribes about emergency hearings should not occur. Efforts need to be made to notify them about emergency hearings so they can participate.

Among the items needed when filing an initial petition following an emergency removal should be a list of steps taken to notify the parents, Indian custodians, and the Tribe about any emergency proceeding. *25 C.F.R. § 23.113(d)(3)*. Due to the limited time available, ICWA and MICWA do not require formal notice of emergency proceedings. To protect the parents, Indian custodians, and Tribes' due process and other rights, it is recommended that the state take all practical steps to contact them. This informal notification process should include attempts to contact them by telephone, text, email, or in person. *BIA Guidelines, C.9. at p. 29*.

The federal regulatory definition of emergency proceedings is intended to cover hearings that occur shortly after removal to determine whether the removal was necessary to protect an Indian child from imminent physical damage or harm. *BIA Guidelines, C.1. at p. 23*. Emergency protective services (EPS) hearings occur in all DN cases throughout Montana. These court hearings must be scheduled within five business or working days of a child's removal from their home. *MCA 41-3-306(1)(a)*. In addition, pre-hearing conferences, which are not court hearings, must be held within five business or working days of a child's removal and before the EPS hearing. *MCA 41-3-307(1)*. Under Montana law, business or working days do not include holidays or weekends. Therefore, these events typically occur about a week after the children's removals.

As emergency proceedings, ICWA notice requirements are not necessary for pre-hearing conferences or EPS hearings. *MCA 41-3-306(8)*. However, it is strongly recommended that parents, Indian custodians, and any Tribe or potential Tribes be informally notified concerning pre-hearing conferences and EPS hearings due to their valuable contributions and to preserve their rights to due process.

Emergency Removal of Indian Children

ICWA and MICWA set requirements for when an Indian child may be removed from their home in an emergency and what must happen after an emergency removal.

Emergency Removal

An Indian child can only be removed on an emergency basis to prevent "imminent physical damage or harm" to the child. Any emergency removal of an Indian child must end immediately

when it is no longer necessary to prevent imminent physical damage or harm. *25 C.F.R. § 23.113; MCA 41-3-1325(2)*. The comments to the federal regulations make clear that the United States Congress did not intend “imminent physical harm” to be limited to situations causing serious bodily injury or death, as the phrase encompasses the child’s health, safety, and welfare. *Indian Child Welfare Act Proceedings, 81 F.R. 38793-94 (Tuesday, June 14, 2016)*.

An emergency removal can be ended by the following:

- Initiating a child custody proceeding subject to ICWA and MICWA, including the notice provisions,
- Moving the child to the appropriate Indian Tribe’s jurisdiction, or
- Returning the child to a parent or Indian custodian. *25 C.F.R. § 23.113(c); MCA 41-3-1325(4)*.

In other words, the state could pursue a DN case in the appropriate Montana District Court or the matter could be transferred to a Tribal Court. If these legal actions are not pursued, the child should be returned home.

An emergency removal should not last more than 30 days in a Montana District Court unless the judge makes specific findings that:

- Returning the Indian child home would subject them to imminent physical damage or harm,
- The District Court has been unable to transfer the proceeding to the jurisdiction of the appropriate Tribe, and
- It has been impossible to initiate a child custody proceeding. *25 C.F.R. § 23.113(e); MCA 41-3-1325(7)*.

Most emergency removals result in the filing of DN cases, with child custody proceedings held before a Montana District Court. Some of these cases are transferred to a Tribal Court, either before or after child custody proceedings are initiated in a Montana District Court. A few matters may not be pursued in either court, with the Indian child returned home, possibly with a safety plan in place.

Court Jurisdiction

ICWA and MICWA establish circumstances when Tribal Courts have exclusive jurisdiction over a case involving an Indian child. These acts also create concurrent jurisdiction, allowing either a Tribal Court or a Montana District Court to handle a case.

Jurisdiction

Jurisdiction determines which court will handle and make decisions about a case. DN cases can be within the jurisdiction of a Tribal Court or a Montana District Court. Jurisdiction for a case involving an Indian child may depend on where a child lives, where a case is filed, or where the Tribe, parents, or Indian custodian wants the case to be heard.

- **Exclusive Jurisdiction** – means that only a Tribal Court can handle and make decisions about the case. These cases belong in Tribal Court if one exists to exercise jurisdiction. An Indian child's Tribe retains exclusive jurisdiction over the case if the Indian child is domiciled or resides on a reservation where the Tribe exercises exclusive jurisdiction over child welfare proceedings or the Indian child is a ward of the Tribal Court. *25 U.S.C. § 1911(a); MCA 41-3-1310(1) & (2)*. ICWA broadly defines a reservation, including all land within the reservation boundaries, dependent Indian communities, and land held in trust for the benefit of the Indian Tribe. *18 U.S.C. § 1151; 25 C.F.R. § 23.2*. If a child lives on a reservation or is a ward of the Tribal Court, the Tribal Court can take exclusive jurisdiction over the case.
- **Concurrent Jurisdiction** – means that either the Tribal Court or a Montana District Court can have jurisdiction over a case. A Tribal Court has concurrent, but presumptive jurisdiction, with a Montana District Court when the Indian child does not reside or have a domicile on a reservation and the Indian child is not a ward of the Tribal Court. *25 U.S.C. § 1911(b); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989)*. In that case, either the Tribal Court or a District Court can handle the case.

Right to Intervene

Indian custodians and an Indian child's Tribe have the right to intervene in DN cases held before a Montana District Court.

In Montana District Courts, Indian custodians are generally treated similarly to parents. The state does not wait for them to intervene. They are personally served and appointed counsel when a DN case is filed. Indian custodians are typically treated as parties from the outset of a DN case.

The Tribe can intervene at any time during a foster care placement or termination of parental rights hearing. *25 U.S.C. § 1911(c)*. The intervenor becomes a party to the DN case, with all the rights of a party. They are entitled to notice and service of all motions and filings. They can participate in court proceedings, file motions, make arguments, present evidence, view court documents and reports, and request a transfer of jurisdiction. *25 C.F.R. § 23.134*.

Transfer of Jurisdiction from a Montana District Court to a Tribal Court

A parent, Indian custodian, or the Tribe may request a transfer of jurisdiction to the Tribal Court from a Montana District Court when there is concurrent jurisdiction. They can make this

request at any point during court proceedings for foster care placement or the termination of parental rights. *25 U.S.C. § 1911(b); 25 C.F.R. § 23.115*. The language of ICWA does not provide for the transfer of jurisdiction after the termination of parental rights. However, MICWA provides that a transfer request can occur during any child custody proceeding. *MCA 41-3-1310(3)*. Montana ICWA defines child custody proceedings to include proceedings, other than emergency proceedings, that may culminate in a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement. *MCA 41-3-1303(3)*.

Limitations on Transfers to Tribal Court: When there is an appropriate request for transfer, a Montana District Court must transfer the matter to Tribal Court unless:

- Either parent objects to the transfer,
- The Tribal Court declines the transfer, or
- “Good Cause” exists to deny the transfer. *25 U.S.C. § 1911(b); 25 C.F.R. § 23.117; MCA 41-3-1310*.

Tribes will sometimes seek a transfer of jurisdiction later in a case when termination of parental rights is being explored as an option in state court. There are historical and cultural reasons why Tribes generally object to the termination of parental rights as a permanency option. CFSD usually does not object to requests to transfer jurisdiction before the termination of parental rights.

If either parent objects to a transfer from a Montana District Court to a Tribal Court, the case will remain in state court. This decision prevents a transfer even if the parent objecting is not a tribal member. Parents effectively have the power to veto a transfer to the Tribal Court.

The Tribal Court can also decline a transfer of jurisdiction. They do not have to accept a transfer. A District Court cannot force a Tribal Court to accept a transfer.

A District Court can deny a transfer of jurisdiction based on “good cause.” However, there are limitations on what constitutes “good cause” to deny transfers.

Good Cause to deny transfers to the Tribal Court does not include:

- Whether or not the proceeding is in an advanced stage, if the parents, Indian custodian, or Tribe did not receive notice of the child custody proceeding until an advanced stage,
- Whether in prior proceedings, no request was made to transfer the matter to the Tribal Court,
- Whether the transfer would affect the child’s placement,
- Whether the child has a connection to the Tribe or reservation, or
- Socio-economic conditions or negative perceptions regarding the tribal justice system or the availability of social services. *25 C.F.R. § 23.118*.

MICWA modifies the ICWA restrictions on good cause to deny a transfer. MICWA states that the fact a case is in an advanced stage standing alone is not a good cause to deny a transfer to a Tribal Court, whether or not the parents, Indian custodians, or Tribe received late notice of the proceedings. *MCA 41-3-1310(6)(b)(i)*.

Active Efforts Required in ICWA Cases

ICWA and MICWA establish a standard of “active efforts” to be made by CFSD that is greater than the reasonable efforts standard required in non-ICWA cases. The law states, “Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” *25 U.S.C. § 1912(d)*; *MCA 41-3-1319(1)*.

Thus, active efforts begin before a case is filed to prevent the removal of a child. These efforts must continue throughout the case in an attempt to reunite the family. Active efforts must be used to avoid the breakup of an Indian child’s family. Before involuntarily placing an Indian child in foster care or terminating parental rights, the District Court must determine that active efforts were made to prevent the child’s removal from their home and to reunify the family. The court must also find that these efforts were unsuccessful.

Active efforts must be documented in the court’s record. Active efforts, which should be conducted in partnership with the Indian child, their parents, extended family members, Indian custodians, and the Tribe, are at the heart of ICWA. *25 C.F.R. § 23.2*; *MCA 41-3-1303(1)*. They are a higher standard and more significant than the reasonable efforts standard required in non-ICWA cases. Active efforts are “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family.” *25 C.F.R. § 23.2*. “The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for them to complete it would constitute passive efforts.” *In the matter of A.N., 325 Mont. 379, 384, 106 P.3d 556, 560 (2005)*.

ICWA defines active efforts as “assisting the parents or Indian 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 Indian child’s Tribe and should be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe.” *25 C.F.R. § 23.2*; *MCA 41-3-1319(4)(a)*. MICWA clarifies that a referral to a service or program does not constitute active efforts if the referral was the sole action taken. *MCA 41-3-1319(4)(b)*.

Examples of active efforts include, but are not limited to:

- Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal,
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services,
- Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the family in conferences, family engagement meetings, permanency planning, and resolution of placement issues,
- 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 parents,
- 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,
- Taking steps to keep siblings together whenever possible,
- Supporting regular family time 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,
- 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,
- Monitoring progress and participation in services,
- 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, and
- Providing post-reunification services and monitoring. *25 C.F.R. § 23.2; MCA 41-3-1319(4)(a).*

Placement of Indian Children

When Indian children are removed from their homes, ICWA and MICWA have established a list of preferences for their placement.

The placement of Indian children should:

- Approximate a family setting, including consideration of sibling attachments,

- Allow the children's needs to be met, and
- Be reasonably close to the Indian child's home, extended family, or siblings. *25 C.F.R. § 23.131(a); MCA 41-3-1329(1).*

Preferred Placements

One of the purposes of ICWA and MICWA is to provide for the placement of Indian children "in foster and adoptive homes which will reflect the unique values of Indian culture." *25 U.S.C. § 1902; MCA 41-3-1302.* These culturally appropriate placements are designed to support ICWA's overall intent of protecting the best interest of Indian children and promoting the stability and security of Indian Tribes and families.

ICWA and MICWA provide a set of preferred placements for foster care, preadoption, and adoption. *25 U.S.C. § 1915; MCA 41-3-1329(2) & (3).* These preferences include family, tribal, and other Native American placements. However, if an Indian child's Tribe has an established set of placement preferences, those placement preferences should be applied instead of the general placement preferences listed in ICWA and MICWA. *25 U.S.C. § 1915(c); MCA 41-3-1329(4).* For instance, the Confederated Salish and Kootenai Tribes have placement preferences. *CSKT Laws Codified, 3-2-612.* Thus, CFSD should verify whether an Indian child's Tribe has placement preferences before selecting a placement option.

If the Tribe has not established placement preferences, the preferences set by ICWA and MICWA apply. The following preferences in numerical order apply for foster care and preadoption placement of an Indian child.

Foster Care and Preadoption Placements Preferences

1. A member or members of the Indian child's extended family,
2. A foster home licensed or approved by the Indian child's Tribe,
3. An Indian foster home approved by the state of Montana, or
4. An Indian institution approved by the Indian child's Tribe. *25 U.S.C. § 1915(b); MCA 41-3-1329(2).*

There are slightly different placement preferences when an Indian child is being adopted due to the permanency of adoption. However, again, the list prefers family, then members of the Tribe, and finally, other Native American families. If the Tribe does not have established placement preferences, the following placement preferences, in numerical order, apply to the adoption of an Indian child.

Adoption Placement Preferences

1. A member or members of the Indian child's extended family,
2. Other members of the Indian child's Tribe, or
3. Other Indian families. *25 U.S.C. § 1915(a); MCA 41-3-1329(3).*

Extended Family

The extended family must be fit and willing to care for the child. Nothing in ICWA or MICWA provides for placing an Indian child in an unsafe home or with unfit relatives or kin. However, investigations of extended family placements must be conducted in a culturally appropriate manner, considering the child's culture and the child-rearing practices of the Tribe.

It is important to note that placements with extended family can be with non-Native American family members. The first placement preference under ICWA and MICWA is with extended family, regardless of whether the family member is a tribal member or eligible for membership. There are no ICWA or MICWA placement preferences between extended family members.

ICWA defines extended family for an Indian child. Extended family is "defined by the law or custom of the Indian child's Tribe or, in the absence of such rule or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." *25 U.S.C. § 1903(2)*. MICWA expands this definition of "extended family" to also include all cousins, stepparents, and step-grandparents even following the termination of a marriage. *MCA 41-3-1303(9)(b)*.

It is important to note that placement with a sibling under the age of eighteen is not considered a preferred placement with extended family under ICWA and MICWA unless there is an adult extended family member who serves as the foster care provider in the home. ICWA and MICWA define extended family broadly, but provide deference to any definition of extended family created by the Indian child's Tribe.

Good Cause to Depart from Placement Preferences

There may be good reasons to depart from the ICWA and MICWA placement preferences. These reasons take into account the preferences of parents and the child, as well as sibling attachments. While placement with a sibling under the age of eighteen is not, by itself, a preferred placement, it could be a good cause to depart from the placement preferences. A child's unique needs could also affect placement preferences. A District Court may depart from the placement preferences if there is good cause, but the court is not required to do so. In addition, placement preferences must account for the possibility that ICWA and MICWA placement preferences cannot be met after a diligent search for an appropriate placement has been conducted.

Good Cause to depart from placement preferences may be based on:

- A request by one or both parents after reviewing all placement options,
- A request from an Indian child of sufficient age and capacity,
- Sibling attachments that can be maintained only through a particular placement,
- Extraordinary physical, mental, or emotional needs for an Indian child, or

- Unavailability of suitable placement after a diligent search. *25 C.F.R. § 23.132(c); MCA 41-3-1329(8)(c)*.

Some items should not be considered when determining if good cause exists to deviate from the ICWA and MICWA placement preferences.

Good Cause to depart from placement preferences should not be based on:

- Socio-economic status of one placement option relative to another, or
- Solely on ordinary attachment or bonding with a non-preferred placement that flowed from time spent in a non-preferred placement that was made in violation of ICWA. *25 U.S.C. § 23.132 (d)&(e)*.

Standards of Proof

ICWA and MICWA cases have higher standards of proof in child custody proceedings, including foster care placements and terminations of parental rights hearings, than non-ICWA cases. Before a petition is filed with a Montana District Court, the County Attorney, Deputy County Attorney, or Assistant Attorney General will assess whether they believe sufficient proof exists to file a petition. This assessment is based on information provided by and discussions with CFSD staff. Ultimately, if a petition is filed, the judge will decide if the standard of proof has been met.

Causal Relationship between Safety Concerns and Harm to the Child

There must be a causal relationship between the alleged safety concerns and the likelihood that continued custody by the parent, parents, or Indian custodian would result in serious emotional or physical harm to the Indian child. *25 C.F.R. § 23.121(c); MCA 41-3-1320(3)(a)*. The mere existence of “community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior” do not by themselves constitute sufficient evidence to find that continued custody is likely to result in serious emotional or physical damage to the child. *25 C.F.R. § 23.121(d); MCA 41-3-1320(3)(b)*.

Due to 2025 Montana legislation, for all DN cases, including ICWA and non-ICWA cases, substance abuse, obesity, disorderly living conditions, and other factors related to poverty, standing alone are not considered to be child abuse or neglect. *SB 18 (2025); MCA 41-3-102*. All of these items could be factors in finding that a home is unsafe and harmful to the child. However, by themselves, they do not establish a causal relationship, which would allow for a foster care placement or termination of parental rights.

Foster Care

A petition produced by a County Attorney, Deputy County Attorney, or Assistant Attorney General seeking a foster placement must state the specific authority requested and be

supported by an affidavit signed by a CFSD representative stating the alleged facts upon which the request is made. *MCA 41-3-422*. Formal notification to the parents, Indian custodian, and Tribe is required for a child custody proceeding seeking a foster placement. *25 U.S.C. § 1912(a); MCA 41-3-1311(1)*. The affidavit of the CFSD representative must also contain any statements made by the parents about the case. *MCA 41-3-427(1)(b)*.

Child custody proceedings involving the placement of an Indian child in foster care require **clear and convincing evidence**, “including the testimony of one or more qualified expert witnesses (QEW), 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.” *25 U.S.C. § 1912(e); 25 C.F.R. § 23.121(a); MCA 41-3-1320(1)*. If an Indian child is involved, clear and convincing evidence must establish that the child is abused or neglected or is in danger of being abused or neglected. *MCA 41-3-427(1)(b)*. In non-ICWA cases, a lesser standard of proof, namely a preponderance of the evidence, which means more likely than not, is used. A QEW is not required in foster care proceedings in non-ICWA cases.

As stated previously, for an Indian child to be removed in an emergency, the removal must also seek to prevent “imminent physical damage or harm.” Any emergency removal or placement of an Indian child under Montana law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. *25 C.F.R. § 23.113; MCA 41-3-1325(2)*.

Termination of Parental Rights

If the state seeks termination of parental rights or the rights of an Indian custodian, an additional petition must be filed by a County Attorney, Deputy County Attorney, or Assistant Attorney General with the District Court, providing the grounds for termination. *MCA 41-3-422(1)(a)(v) & 607(1)*. The petition must be supported by an affidavit signed by a CFSD representative stating in detail the alleged facts upon which the request is made. *MCA 41-3-422(2)(a)*. Although formal notification was previously provided for the foster care placement, parents, Indian custodians, and the Tribe must be provided additional formal notice regarding any child custody proceeding seeking termination or parental or Indian custodian rights. *BIA Guidelines, D.1, at p. 31*.

Termination of parental rights proceedings involving an Indian child require **proof beyond a reasonable doubt**, “including the testimony of one or more qualified expert witnesses (QEW), demonstrating that the child’s continued custody by the child’s parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” *25 U.S.C. § 1912(f); 25 C.F.R. § 23.121(b); MCA 41-3-1320(2)*. These standards are higher than the standard of proof required for termination of parental rights hearings in non-ICWA cases, which is clear and convincing evidence. QEW testimony is not required in non-ICWA termination of parental rights hearings.

Qualified Expert Witness (QEW)

A QEW must testify about the potential for serious emotional or physical damage to the Indian child. *25 U.S.C. § 1912; 25 C.F.R. § 23.121; MCA 41-3-1318(1)*. The role of a QEW is not to testify as an expert on ICWA or MICWA. Foster care placement proceedings and termination of parental rights hearings involving an Indian child both require testimony from QEWs.

A QEW must be able to testify:

- Whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and
- Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. *25 C.F.R. § 23.122(a); MCA 41-3-1318(3)*.

An Indian child's Tribe can designate individuals available to be QEWs who can testify to the prevailing social and cultural standards of an Indian child's Tribe. *25 C.F.R. § 23.122(a)*. Any party to the case or the judge can seek assistance from the Indian child's Tribe or BIA to locate a QEW. *25 C.F.R. § 23.122(b)*. MICWA requires the state to consult with an Indian child's Tribe to determine whether they have a list of preferred QEWs. To the extent possible, the state must utilize those individuals as QEWs in child custody proceedings. *MCA 41-3-1318(2)*.

However, the Tribe and BIA are not required to provide a designated QEW. Nevertheless, the state must present testimony from a QEW. If difficulties arise in finding an appropriate QEW, you can contact the Montana Department of Public Health and Human Services (DPHHS), American Indian Child and Family Support Specialist for assistance. A list of individuals who have received training on the role of a QEW with their tribal affiliations can be found at:

<https://dphhs.mt.gov/assets/cfsd/ICWA/QEWContacts.pdf>

The Child Protection Investigator and Child Reunification Specialist from CFSD assigned to the Indian child's DN case cannot be the QEW. Another person or persons must fill that role. *25 C.F.R. § 23.122(c)*. MICWA additionally excludes their supervisor or supervisors at CFSD from being the QEW. *MCA 41-3-1318(4)(a)*. The role of a QEW is to educate the court and parties regarding the Tribe's social, cultural, and child-rearing practices. A QEW's knowledge may surpass the Child Protection Investigator's and Child Reunification Specialist's understanding of the child's Tribe. It is also recommended that a QEW contact the Indian child and their family to provide the District Court with a more complete picture of the family's situation. *BIA Guidelines, G.2. Qualified Expert Witness, p. 55*.

For more information about QEWs, visit the Court Improvement Program (CIP) website at cip.mt.gov, where you will find a link to eLearning guides, including one specifically about the role of a QEW.

Voluntary Proceedings

ICWA and MICWA apply to involuntary child custody proceedings. However, they also apply to certain voluntary proceedings for foster care placement, termination of parental rights, and adoption. A parent or Indian custodian can voluntarily choose to place a child in foster care or agree to terminate their parental or Indian custodian rights.

There are additional conditions for voluntary proceedings when an Indian child is involved. ICWA and MICWA require that any voluntary consent for foster care placement or termination of parental rights must be:

- In writing,
- Recorded before a judge in the appropriate jurisdiction,
- With a written certificate from the presiding judge that the terms and consequences of the consent were explained to and understood by the parent or Indian custodian, and
- The consent cannot be given within ten days of the child's birth. *25 U.S.C. § 1913; MCA 41-3-1326(2) & (3).*

In a voluntary proceeding before a Montana District Court, the judge must ask the participants to state whether the child is an Indian child or whether there is reason to believe the child is an Indian child. *25 C.F.R. § 23.124(a)*. If there is reason to believe a child is an Indian child, ICWA and MICWA apply to the voluntary proceeding. The participants should provide information about why they think there is a reason to believe the child is an Indian child.

In Montana, parents, guardians, or other individuals with physical or legal custody of the child, including Indian custodians, may agree to the voluntary placement of the child outside the home for up to 30 days. *MCA 41-3-302(3)(a)*. This statute applies whether or not an Indian child is involved. These voluntary placements aim to protect the child while attempting to address safety issues. The goal is the reunification of the family. At the end of 30 days, the state must either file a DN case or return the child. If an Indian child is involved, consenting to such a voluntary placement requires compliance with the above-listed conditions of ICWA and MICWA.

A parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time during the voluntary arrangement. The Indian child should then be returned to the parent or Indian custodian immediately. *25 U.S.C. § 1913(b); MCA 41-3-1326(4)*.

A parent or Indian custodian can withdraw their consent to the termination of their parental rights or an adoption before the court finalizes the respective decree. *25 U.S.C. § 1913(c); MCA 41-3-1326(5)*.

The placement preferences of ICWA and MICWA apply to voluntary proceedings in the same way they do to involuntary child custody proceedings. In general, there is a preference for

placement with extended family and tribal members. *BIA Guidelines, I.2. Placement preferences in Voluntary Proceedings, pp. 64-65.*

Notice to the Tribe of voluntary proceedings is recommended. *BIA Guidelines, I.3. Notice in voluntary proceedings, p. 65.* Such notice promotes continuing tribal involvement and the Tribe can assist with placement preference compliance. The state and Tribe must keep the information and documents concerning a voluntary placement confidential when a parent wishes to remain anonymous. *25 C.F.R. § 23.124(b).*

Montana Indian Child Welfare Act (MICWA)

During the 2023 Montana legislative session, MICWA was enacted. It is largely based on ICWA. The 2025 Montana Legislature removed a sunset clause from the act, thus indefinitely extending MICWA. *SB 147 (2025).*

MICWA was created in part due to concerns that the United States Supreme Court might find ICWA in whole or in part unconstitutional during its 2023 session, thus denying Native American children, families, and Tribes the benefits of ICWA. The Montana version was passed to protect those rights in Montana. Fortunately, the United States Supreme Court ruled that ICWA is constitutional and denied the legal challenge. *Haaland vs. Brackeen, 599 U.S. 255 (2023).*

Thus, ICWA and MICWA are both currently in place. While these acts are very similar, some slight differences in MICWA were designed to improve, expand, and clarify provisions of ICWA. Where state law offers greater protections through MICWA, Montana District Courts must enforce those additional protections. *25 U.S.C. 1921.*

Differences between ICWA and MICWA

The MICWA modifications of ICWA are as follows:

MCA 41-3-1303(9)(b): if the Indian child's Tribe does not identify family members by law or custom, this section of MICWA expands on the ICWA definition of "extended family" to also include all cousins, stepparents, and stepgrandparents, even following the termination of a marriage. This is in addition to the definition of extended family members already identified in ICWA. The Montana statute, like ICWA, defers to any tribal identification of extended family members if one exists.

MCA 41-3-1310(6)(b)(i): provides that a District Court cannot consider whether a case is at an advanced stage when determining if good cause exists to deny a request to transfer a case to a Tribal Court. This provision effectively eliminates the additional ICWA requirement that the state also did not provide notice to the parents, Indian custodian, or Tribe until the proceeding was in an advanced stage.

MCA 41-3-1311(2)(d): requires the state to provide notice to the Indian child's Tribe for all petitions filed before the District Court, not just the initial petition when a child is removed or a petition to terminate parental rights, as required by ICWA. Like ICWA, MICWA requires that the initial petition and any petition to terminate parental rights be served on the Tribe by certified or registered mail. However, MICWA requires that any additional petitions filed during the DN case be sent to the Tribe by first-class mail. It is best practice to routinely communicate with the Tribe regarding all ongoing proceedings by phone, text, email, or in person.

MCA 41-3-1311(2): seeks to clarify that in Montana, parents and Indian custodians, like all parents or guardians in DN cases, must be served personally or by alternative means of personal service, like publication, when actual personal service cannot be accomplished. *MCA 41-3-422*. According to MICWA, personal service of parents and Indian custodians takes the place of service by certified mail since it is a higher standard for service of process. However, federal regulations indicate that personal service may occur in addition to service by certified or registered mail, but personal service does not replace the requirement of service by mail. *25 C.F.R. 23.111 (c)*. Thus, it is unclear whether the service of parents and Indian custodians in Montana should be only by personal service or by personal service and certified or registered mail. It may be a good practice to serve them through both processes.

MCA 41-3-1318(2): requires the state to consult with an Indian child's Tribe to determine whether they have a list of preferred qualified expert witnesses (QEW). The state must, to the extent possible, utilize those individuals as QEWs in court proceedings. No similar requirement exists under ICWA to consult with the Tribe and use their preferred QEWs when possible.

MCA 41-3-1318(4)(a): MICWA not only prohibits the Child Protection Investigator and Child Reunification Specialist assigned to a DN case from serving as a QEW, but also restricts their supervisor or supervisors from serving as the QEW. ICWA only prohibits the Child Protection Investigator and Child Reunification Specialist from serving in this capacity, not their supervisor or supervisors.

MCA 41-3-1310(4)(b): MICWA clarifies that a referral to a service or program does not constitute an active effort if the referral is the sole action taken. More significant efforts are required to meet the burden of active efforts by the state.

MCA 41-3-1326(1): MICWA provides that during involuntary foster care placement hearings, a stipulation or consent by the parent or Indian custodian is not valid unless the court certifies on the record that the terms and consequences of the stipulation or consent were fully explained and understood by the parent or Indian custodian. ICWA does not require such a certification in involuntary proceedings. Certification of this nature is only required by ICWA during voluntary proceedings.

Conclusion

This guide aims to expand your understanding of ICWA and MICWA and ensure that those acts are adhered to in all Montana jurisdictions for the benefit of the entire state, including Indian children, Tribes, and families.

ICWA sets minimum standards for all states concerning the removal, reunification, and placement of Indian children. It recognizes that Tribes are sovereign governmental entities with the right to protect their culture, children, and families. ICWA establishes a policy for the entire nation, including Montana. “It is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian Tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...” *25 U.S.C. § 1902*. That policy and the ideals of ICWA are as important today as they were when ICWA was enacted in 1978.

As evidence of ICWA’s importance to the people of Montana, the Montana Legislature passed a similar act, MICWA, in 2023 and extended that state act indefinitely in 2025.

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