



CHILD WELFARE CODE

DEVELOPMENT OR IMPROVEMENT

01. UNDERLYING PRINCIPLES, DEFINITIONS AND TERMINOLOGY

Child welfare cases are not intended to be adversarial; they should be resolved collaboratively between parents, agency workers, service providers and the judge. The child welfare agency is concerned about the safety and welfare of tribal children. Emphasize the principle of family preservation and the goals, rights, duties and obligations of parties, families and tribal government. Define words, phrases and terminology clearly and simply so parents and families can better understand and participate.

02. INCORPORATE TRIBAL CUSTOM, TRADITION AND GENERALLY ACCEPTED PRACTICES; JUDICIAL RECOGNITION AND APPLICATION

Tribal sovereignty means acknowledging in your tribal laws that tribal ideals and processes are based on tribal values and practices. Include language that acknowledges custom, tradition and generally accepted practices regarding family care and preservation and parental and family child-rearing duties and responsibilities, and requires the Tribal Court to apply them when appropriate.

03. PRE-REMOVAL/PRE-FILING RESOLUTION; DIVERSION

Require child welfare workers to identify families and children at risk and take proactive, documented steps to maintain family preservation, offering available services and programming through a case plan that diverts the situation from entering the Tribal Court. Consider using Title IV-B¹ and FFPSA² funding and assistance. If active preservation efforts fail, a child welfare petition can be filed in Tribal Court.

04. PROCEDURES UPON FILING IN TRIBAL COURT

Clearly and simply describe the types of pleadings used and their purpose. Describe the types, sequence, and purposes of hearings. Clearly detail timelines and deadlines. Explain how and why emergency child removal/placement orders are issued. In terms that unrepresented parents can understand, clearly explain the burden of proof of the child welfare agency, the standard of proof applicable to each type of judicial determination (probable cause, preponderance, clear and convincing, beyond a reasonable doubt) as well as the evidentiary standards that will apply (strict Rules of Evidence and/or allowing certain types of hearsay). Describe how a child welfare case can be handled by informal resolution between the child welfare agency and the parents through an agreed upon case plan which, if followed with judicial oversight, can result in dismissal of the petition and reunification of the family.

05. OUT-OF-HOME PLACEMENT AND PERMANENCY

At some time before or during the pendency of a Tribal Court child welfare case, the Tribal Court may order that a child's best interests are served by removing the child from parental custody and placing the child with relatives or in a foster home. The tribe may wish to establish a list describing kinship or foster home placement and any preferences according to family, clan or tribal affiliation ties. Consider whether Title IV-E guardianship/foster placement financial assistance³ is desired, either by direct reimbursement to an ACF-approved tribal Title IV-E program or through a state Title IV-E program under a tribal-state agreement. This same placement preference list can similarly be used in Indian Child Welfare Act (ICWA) transfer or intervention situations. Decide also whether to access the Bureau of Indian Affairs' (BIA) TAP program⁴ for criminal history checks in order to comply with emergency and foster care placement requirements under the Native American Children's Safety Act (NACSA).⁵ When all family preservation and reunification efforts have failed, consider whether permanency will be achieved by foster care placement, permanent guardianship, or adoption (either traditional or Western-style), or some combination of these dispositions, again keeping in mind NACSA considerations.

06. ICWA TRANSFERS AND INTERVENTIONS

If the tribe moves a state court to transfer a child welfare case involving a tribal member child or membership-eligible child to the Tribal Court, the tribal code should describe a well-defined process for acceptance of transfer of the case by the Tribal Court. ICWA provides that a Tribal Court may decline to accept a transfer. While typically rare, declination may occur, for instance, if the child has special needs that require care or services not available on the reservation. As noted above, whether an ICWA case is transferred to Tribal Court or the tribe decides only to intervene in a state court case, a specific list of tribal placement preferences would supersede any placement required by ICWA.

07. ADDITIONAL RESOURCES

Additional, and more detailed, information about establishing or revising tribal child welfare codes and model code provisions can be located by accessing the following online resources.

Tribal Law and Policy Institute Guide for Drafting or Revising Tribal Civil Dependency Laws, https://docs.wixstatic.com/ugd/8305c9_5065dcd78e2e45d19662bf0ef9cc96d8.pdf and Bureau of Indian Affairs Revised Model Code, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ojs/ojs/pdf/idc2-047015.pdf>.

CHECKLIST FOR CHILD WELFARE CODES

- Define legal words and phrases in easy-to-understand terms.
- Incorporate tribal family care custom and tradition in your code.
- Explain the child welfare court process in simple terms.
- Establish definitive family or non-family child placement preferences in your law.

¹ See, <https://www.acf.hhs.gov/cb/resource/pi1802>.

² See, <https://www.acf.hhs.gov/sites/default/files/cb/pi1810.pdf>.

³ See, <https://www.acf.hhs.gov/cb/programs/state-tribal-funding>.

⁴ See, <https://www.justice.gov/tribal/tribal-access-program-tap>.

⁵ See, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Draft_Guidance_for_NACSA.pdf.

This project was supported by Grant No. 2016-IC-BX-K003 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.