

ICWA Quick Reference Guide

Involuntary Proceedings

Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63; ICWA Proceedings Final Rule, 25 CFR § 23

ICWA applies to an *Indian child* subject to a *child custody proceeding*

Indian Child:

- Unmarried, under 18 years & Member/citizen of Tribe, or
- Eligible for membership & biological child of member

Child custody proceeding:

- Child in Need of Care
- Termination of parental rights
- Preadoptive & Adoptive Placements
- Status offenses if out-of-home
- But NOT delinquency

EXCLUSIVE TRIBAL JURISDICTION

The Tribal Court has Exclusive Jurisdiction if

the child resides or is domiciled on the reservation or is a ward of tribal court

Indian Child's Domicile:

That of parents, custodial parent (if the parents unmarried), Indian custodian, or guardian

EMERGENCY REMOVAL STANDARD: Necessary to prevent imminent physical damage or harm to the child

The Court must:

1. Make a finding on the record
2. Promptly hold a hearing when information shows emergency ended
3. Immediately terminate proceeding when sufficient evidence shows emergency removal/placement is no longer necessary

Time Limits -No longer than 30 days unless the Court determines that:

1. Restoring the child to parent or Indian custodian would subject child to imminent physical damage or harm
2. Court has been unable to transfer jurisdiction
3. It has not been possible to initiate a child-custody proceeding

A petition for emergency removal or continued placement must comply with 25 CFR § 23.113(d).

Qualified Expert Witness (QEW) is NOT required

Actions that terminate an Emergency Proceeding:

1. Initiate a child-custody proceeding
2. Transfer to Tribal court
3. Return child to parent or Indian custodian

INQUIRY

At commencement of each proceeding, the Court must:

- Ask if anyone has reason to know if child is an Indian child
- Instruct all parties to inform the court of subsequent information

When there is a reason to know, but insufficient evidence:

- Confirm the agency used due diligence to identify all tribes
- Treat as Indian child unless & until the court can positively determine

Examples of the court having a 'reason to know' triggering inquiry

- Attendance at tribal functions
- Received tribal services
- Information from child or family of possible ancestry
- Prior residence on tribal land

ACTIVE EFFORTS

Active efforts should:

- Begin as soon as possible
- Be tailored to the facts and circumstances of individual cases
- Be affirmative, active, thorough, timely
- Be intended to reunite an Indian child with his or her family

Courts must

- Conclude that the agency made active efforts
- Document the finding on the record

PROPER REMOVAL & RETENTION

- The Court must expeditiously determine whether removal/retention was proper: *that returning an Indian child to parents or Indian custodian would subject the child to immediate danger or threat of such danger*
- If improper, the court must terminate proceedings and immediately return child to parents or Indian custodian
- **Improper removal may be asserted at any time by any party**

TIME LIMITS & EXTENSIONS

- No foster-care placement or TPR proceeding may be held until at least **10 days** after receipt of notice
- Parents, Indian custodians and Tribes have a right to an additional **20 days** for preparation
- Additional time may be available under State law or pursuant to extensions granted by court

DETERMINATION OF TRIBAL MEMBERSHIP

As sovereign governments, tribes have sole authority to determine their own membership/citizenship. **The State Court** may not substitute its own determination

To make a judicial designation of Indian child's tribe:

- The state court may rely on documents or testimony indicating membership
- If child may be a citizen of more than one tribe:
 - the court should give deference to the tribe in which child is already a member unless otherwise agreed to by tribes
 - the court must provide the opportunity for the Tribes to determine which should be designated as the child's Tribe

NOTICE

Courts must ensure:

1. Party seeking placement:
 - Promptly sends notice of each hearing by registered or certified mail with return receipt requested to each potential Tribe, parent, and Indian custodian
 - Files with the court originals or copies with any return receipts or proof of service
2. Notice is in clear and understandable language and conforms to requirements at 25 CFR 23.2
3. Notice sent to BIA Regional Director if identity or location of parents, Indian custodian or Tribe(s) unknown
4. Language access for those with Limited English Proficiency
5. Parent or Indian custodian is informed of right to attorney
6. Copy of notices sent to BIA Regional Director

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TRANSFER TO CHILD'S TRIBE - Available at any stage of the proceedings

Who may request: Parent, Indian custodian or Tribe orally or in writing where there is concurrent jurisdiction

Notice to Tribal Court:

- State court must ensure child's Tribe receives prompt notice of the transfer petition
- State court may request a timely response from the Tribal court

Tribal Court is defined broadly as any body authorized by tribal law with authority over matters like the case in question

Ruling on Transfer Petitions: Presumption in favor of transfer
State court must transfer the proceeding unless

- Either parent objects
- Tribal court declines
- Good cause exists

In a hearing on good cause to deny transfer, the court must not consider:

- Advanced stage of proceeding, if parent, Indian custodian or Tribe did not receive notice until an advanced stage
- Prior proceedings involving child in which no petition to transfer was filed
- Whether there might be a change in placement
- Child's cultural connections with Tribe or reservation
- Socioeconomic conditions or negative perception of Tribe or BIA social services or judicial systems

STANDARDS OF EVIDENCE - Foster-care placement = clear and convincing; Termination of parental rights = beyond a reasonable doubt

The court must not order a foster-care placement or termination of parental rights unless the evidence shows a **causal relationship** that conditions in the home **likely will result in serious emotional or physical damage to child**

Without a causal relationship, evidence that shows only the following **do not** meet this standard: community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior.

QUALIFIED EXPERT WITNESSES (QEW)

When is QEW Required?

Foster care placements and termination of parental rights. A QEW is NOT required for emergency proceedings

QEW should be qualified to testify regarding:

- Whether continued custody of parent or Indian custodian is likely to result in serious emotional or physical damage to child
- The prevailing social and cultural standards of the Indian child's Tribe

The regularly assigned state agency worker may NOT serve as QEW.

QEWs may be designated by the Tribe and the court may request assistance of Tribe or BIA office to locate a QEW

PLACEMENT PREFERENCES

Adoptive - in descending order:

1. Member of child's extended family
2. Other members of child's Tribe
3. Other Indian families

Foster-care of Preadoptive - in descending order:

1. Member of child's extended family
2. Foster home licensed, approved or specified by child's Tribe
3. Indian foster home approved by the state
4. An institution for children approved by the Tribe or operated by a Tribal agency

And the least restrictive setting that:

- Most approximates a family, considering sibling attachment
- Allows child's special needs to be met, and
- In reasonable proximity to child's home, extended family or siblings

Courts should consider the **preferences of the child and parent** where appropriate

If there is a **different order** of preferences **under Tribal law**, those apply

Good cause to Depart from Placement Preferences

A court's determination must be made on the record or in writing and should be based on one or more of the following:

- Parents' request after they review preferred placement options
- Child's request, if of sufficient age and capacity
- To preserve sibling attachments
- Extraordinary physical, mental or emotional needs of the child
- Unavailability of suitable placement after diligent search. Analysis must conform to prevailing social and cultural standards of the child or family's Indian community

A placement preference departure may not be based on:

- Socioeconomic status relative to another placement, or
- Ordinary bonding or attachment that flowed from time spent in non-preferred placement in violation of ICWA

The party seeking departure from the preferences has the burden to prove by clear and convincing evidence