

# INDIAN CHILD WELFARE ACT (ICWA)

## *Bench Card*

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### **PURPOSE**<sup>1</sup>

To protect the best interests of Indian children and promote the stability and security of federally recognized Indian Tribes and families by establishing minimum federal standards - in addition to the Idaho CPA standards - for the removal of Indian children from their homes for placement in foster care or for adoption.

### **WHEN ICWA APPLIES**<sup>2</sup>

ICWA applies to emergency proceedings and child custody proceedings involving Indian children.

- **Emergency Proceedings:** any emergency removal of an Indian Child from her or his parents. In Idaho, the shelter care hearing in an ICWA case is the emergency proceeding.
- **Child Custody Proceeding:** foster care placement, termination of parental rights, pre-adoptive placements, guardianships and adoption but not custody disputes in divorce proceedings, placement of delinquent Indian children (except status offenses) or voluntary placements where the Indian parent can reclaim the child upon demand. The child custody proceeding starts at the adjudicatory hearing.
- **Indian Child:** An unmarried person under 18 who is either: (1) a member of a federally recognized Indian Tribe or (2) the biological child of a member and eligible for membership. Each Tribe determines its own rules for eligibility.

If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must treat the child as an Indian child unless and until it is determined on the record that the child does not meet the definition of an Indian child.<sup>3</sup>

### **JURISDICTION**<sup>4</sup>

1. **Exclusive Jurisdiction:** Pursuant to ICWA, the Tribe has exclusive jurisdiction if a child resides or is domiciled on the reservation, except where such jurisdiction is otherwise vested in the state by existing federal law. When an Indian child is a ward of a tribal court, the tribal court shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
2. **Concurrent Jurisdiction:** All other ICWA cases have concurrent state and tribal court jurisdiction.
3. **Transfer Jurisdiction:** Upon request of a parent, the Indian custodian, or the Tribe, the state court must transfer jurisdiction to the tribal court unless: 1) a parent objects; 2) the tribal court declines; or 3) the state court finds good cause not to transfer. Request to transfer may be made orally or in writing at any stage of the proceedings.
4. **Emergency Jurisdiction:** A state court may take temporary, emergency jurisdiction of a child who resides on the reservation while a child is off reservation if clearly necessary to prevent imminent physical damage or harm to the child. Jurisdiction shall terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. If

the child cannot be transferred to the Tribe or returned safely to the parent, the case may proceed in state court in compliance with ICWA requirements for a child custody proceeding.<sup>5</sup>

5. Intervention: If the case remains in state court, the Indian custodian of the child and the Tribe can intervene at any stage of the proceedings.<sup>6</sup>

## **EMERGENCY PROCEEDING**

1. State courts must ask each participant if the participant has reason to believe the child is an Indian child. This inquiry must be made of each party throughout the life of the case until the child's status is determined. All responses must be on the record.<sup>7</sup>
2. The State court must make a determination that the removal is necessary to prevent imminent physical damage or harm to the child.<sup>8</sup>
3. Any emergency removal or placement of an Indian child under state law must terminate immediately when the removal or placement is no longer necessary to prevent the imminent physical damage or harm to the child.<sup>9</sup>
4. If the court receives a petition from an Indian child's parent, Indian custodian or Tribe to transfer the proceeding to the jurisdiction of the child's Tribe, the state court must transfer the proceeding, unless the state court determines the transfer is not appropriate because either parent objects, the Tribe declines transfer or good cause exists for denying the transfer.<sup>10</sup>

## **NOTICE OF CHILD CUSTODY PROCEEDING<sup>11</sup>**

Where the court knows or has reason to know that the child is an Indian child, the court must ensure that the Department gives notice of the child custody proceeding as specified by ICWA, even if no conclusive determination has been made that ICWA is applicable.

1. Notice must be given to the child's parents, Indian custodian and each Tribe in which the child may be a member or eligible for membership, by registered mail with return receipt requested. Copies of notices must be given to the regional office of the BIA.<sup>12</sup>
2. The notice must identify the child, and include all of the information required in BIA Regulation Section 23.111(d).
3. Notice must be sent again if TPR is sought, unless the Tribe has previously responded that the child is not a member of or eligible for membership in the Tribe.<sup>13</sup>

## **TIMING<sup>14</sup>**

No foster care placement or termination proceeding can be held until at least 10 days after receipt of notice by the parent, Tribe and Indian custodian. The adjudicatory hearing is the applicable proceeding regarding the 10-day requirement. Upon receiving notice of the proceedings, the Tribe, parent or Indian custodian has the right upon request to be granted 20 days from the date notice is received, to prepare for the proceeding.

## **APPOINTMENT OF COUNSEL<sup>15</sup>**

1. Indigent parent(s) and indigent Indian custodian(s) have the right to appointed counsel in any removal, placement or termination proceeding.
2. Counsel for the child may be appointed at the discretion of the court upon a finding that such appointment is in the best interests of the child.

## FINDINGS

In addition to any state law findings and federal findings required under ASFA, there are two additional findings the court must make in an ICWA case (in a CPA case at the adjudication and in a TPR case at the termination trial). If necessary, a separate ICWA hearing can be set to address these issues.

1. **Active Efforts Finding:** The state must show 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 been unsuccessful.<sup>16</sup> “Active efforts” is defined in the BIA Regulations as “affirmative, active, thorough, and timely efforts to maintain or reunite a child with his or her family.”<sup>17</sup> Active efforts must be documented in detail in the record.<sup>18</sup>
2. **Serious Physical or Emotional Harm Finding Supported by the Testimony of a Qualified Expert Witness:** The state must show, by clear and convincing evidence in a CPA case, and beyond a reasonable doubt in a termination of parental rights proceeding, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.<sup>19</sup>

Who qualifies as an expert?<sup>20</sup>

- a. A person qualified to testify regarding 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.
- b. A person designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the child's Tribe.

The social worker assigned to the case may not serve as a qualified expert witness.

## PLACEMENT PREFERENCES<sup>21</sup>

ICWA sets forth placement preferences when placing Indian children in foster care or an adoptive placement. A Tribe may change the order of preference via tribal resolution.

1. **Foster Care or Pre-adoptive Placement:** The child must be placed in the least restrictive setting which most approximates a family, meets any special needs of the child and is in reasonable proximity to the Indian child's home, extended family, or siblings. A preference must be given, in absence of good cause to the contrary, to placement with (in the following order):
  - a. A member of the Indian child's extended family;
  - b. A foster home licensed or approved or specified by the Indian Tribe;
  - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - d. An institution for children approved by an Indian Tribe.
2. **Adoptive Placement:** A preference must be given, in absence of good cause to the contrary, to placement with:
  - a. A member of the child's extended family;
  - b. Other members of the Indian child's Tribe;
  - c. Other Indian families.
3. **Good Cause to Deviate:** Good cause to deviate from the placement preferences includes:

- a. Request of a biological parent who attests that the parent has reviewed the actual placement options or a child of sufficient age and capacity;
- b. Presence of a sibling attachment maintained only through a particular placement;
- c. Extraordinary physical or emotional needs of the child (need expert testimony);
- d. Unavailability of suitable families for placement after diligent search.

The burden is on the party seeking deviation, who must show by clear and convincing evidence that there is “good cause” to depart from placement preferences.<sup>22</sup>

## ENDNOTES

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<sup>1</sup> 25 U.S.C. § 1902, § 1903(8).

<sup>2</sup> 25 U.S.C. § 1903(1); 25 C.F.R. § 23.103.

<sup>3</sup> 25 C.F.R. § 23.107(b).

<sup>4</sup> 25 U.S.C. § 1911, § 1922; 25 C.F.R. § 23.110, §23.113 (b), § 23.115 - 23.119.

<sup>5</sup> 25 U.S.C. § 1922; 25 C.F.R. § 23.113.

<sup>6</sup> 25 U.S.C. § 1911(c).

<sup>7</sup> 25 C.F.R. § 23.107(a); I.C. § 16-1615(6). Idaho Code provides that the court shall inquire whether there is reason to *believe* that the child is an Indian child. The U.S. Bureau of Indian Affairs regulations, however, provide that where the court has reason to *know* the child is an Indian child, the court must inquire about efforts made to make the determination. The regulations also provide that if the court does not have sufficient evidence to determine that the child is not an Indian child, the court must proceed as if the child is an Indian child.

<sup>8</sup> 25 U.S.C. § 1922; 25 C.F.R. § 23.113.

<sup>9</sup> *Id.*

<sup>10</sup> 25 U.S.C. § 1911(b); 25 C.F.R. § 23.113(c), § 23.115, § 23.117, § 23.118.

<sup>11</sup> 25 U.S.C. § 1912; 25 C.F.R. § 23.112.

<sup>12</sup> 25 U.S.C. § 1912(a).

<sup>13</sup> 25 C.F.R. § 23.111(a).

<sup>14</sup> 25 C.F.R. § 23.112(a).

<sup>15</sup> 25 U.S.C. § 1912(b).

<sup>16</sup> 25 U.S.C. § 1912(d).

<sup>17</sup> 25 C.F.R. § 23.2 (definition of “active efforts”).

<sup>18</sup> 25 C.F.R. § 23.120(b).

<sup>19</sup> 25 U.S.C. § 1912(e) and (f); 25 C.F.R. § 23.121(a) and (b).

<sup>20</sup> 25 C.F.R. § 23.122.

<sup>21</sup> 25 U.S.C. § 1915; 25 C.F.R. § 23.129 – § 23.132.

<sup>22</sup> 25 C.F.R. § 23.132.