CHAPTER 11: The Indian Child Welfare Act (ICWA)

11.1 INTRODUCTION

The Indian Child Welfare Act (ICWA)[1] is a federal statute that was enacted to protect Indian children, preserve Indian families and preserve the ties between Indian children and their tribes. Congress passed ICWA in 1978 in response to the wholesale removal of Indian children from their families.[2] At the time of its enactment, Congress stated that "it is the policy of this Nation to protect the best interests of Indian children...." Congressional findings memorialized in ICWA included that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions" and that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[3]

The Department of Interior, Bureau of Indian Affairs (BIA) promulgated regulations governing ICWA in 2016 (BIA Regulations).[4] These binding regulations provide additional definitions, timelines, and required judicial findings that must be made on the record in an effort to create more consistency in ICWA implementation. The statute and regulations together constitute the minimum federal requirements to protect Indian children and preserve Indian families. States may increase protections and requirements, but may not decrease them beneath the floor created by federal law.[5] In addition to the regulations, the BIA also published non-

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Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "Indian child" refers to all native children as defined by the Indian Child Welfare Act (ICWA); and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] 25 U.S.C. §§ 1901-1963 (2012).

[2] At the time Congress passed ICWA, state courts and social services agencies were removing an extraordinary number of Indian children and placing them in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970s, 92.5% of adopted American Indian children in California had been placed with non-Indian families. This ratio for out-of-culture placement was six times more than that of any other minority group in the country. The adoption rate for Indian children was 8.4 times greater than the adoption rate for non-Indian children. There were 2.7 times as many Indian children in foster care as non-Indian children. *See* American Indian Child Resource Center, *ICWA*, http://aicrc.org/icwa/ (last visited April 30, 2018); B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (1996); Carol Locust, *Split Feathers… Adult American Indians Who Were Placed in Non-Indian Families as Children*, 13 PATHWAYS 11 (September/October 1998).

[3] 25 U.S.C. § 1901(5).

[4] 25 C.F.R. §§ 23.02 – 23.144.

[5] 25 C.F.R. § 23.106.

binding *Guidelines for Implementing the Indian Child Welfare Act* (BIA Guidelines or Guidelines).[6]

ICWA imposes three categories of requirements in cases involving an Indian child. First, ICWA imposes procedural requirements that govern jurisdiction, notice, intervention, and counsel. Second, ICWA imposes substantive requirements for the removal of Indian children and the termination of parental rights, including a higher standard for determining whether the state met the duty to avoid removal of the child and a higher standard to justify the removal. Third, in addition to these jurisdictional and substantive requirements, ICWA imposes limitations on the placement of Indian children to ensure that, to the extent possible, they are not separated from their families, tribes and/or their Indian culture and community.

11.2 INDIAN CHILD WELFARE ACT BASICS

Is the Child an Indian Child? The child is an "Indian child" if he or she is an unmarried person under the age of 18, **and**

1. is a member of a federally recognized Indian tribe; **or**
2. A) is eligible for membership in a federally recognized Indian tribe **and**
   B) is the biological child of a member of a federally recognized Indian tribe.[7]

How is the child's tribe designated?

- Tribes have sole authority to determine their own membership. The state court may not substitute its own determination.
- To make a judicial designation of the Indian child's tribe, the state court may rely on tribal documents or testimony indicating membership or eligibility for membership.
- If the child can be a member of more than one tribe, the state court should
  - give deference to the tribe in which the child is already a member, unless otherwise agreed upon by the tribes,
  - provide opportunity for the tribes to determine which tribe should be designated, and, finally,
  - designate the tribe with which the child has more significant contacts as the child's tribe if the tribes are unable to reach an agreement.[8]

When does ICWA apply? ICWA applies if:

- the proceeding is a child custody proceeding or other covered proceeding under ICWA (such as certain removals in juvenile court and/or emergency removals) and
- the court knows or has reason to know that the child is an Indian child.[9]

[6] Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (December 2016*), available at* https://www.indianaffairs.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (last visited May 3, 2018).
[7] 25 U.S.C. § 1903(4).
[8] 25 C.F.R. § 23.109.
[9] 25 U.S.C. § 1903(1); 25 U.S.C. § 1903(4).

Child custody proceedings are defined as:

- Foster care placements – this includes any action where the child is removed from his or her parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship, and where the parent or custodian cannot have the child returned upon demand but where parental rights have not been terminated.[10]
- Termination of parental rights proceedings.[11]
- Pre-adoptive placements.[12]
- Adoptive placements.[13]

ICWA also applies to the following proceedings:

- Status offenses.[14]
- Voluntary placements under state law where the parent or Indian custodian could be prohibited from regaining custody of his or her child upon demand.[15] "Upon demand" means upon simple verbal request without any formalities or contingencies.
- Emergency proceedings, including any time a child is removed on an emergency basis from the home.[16]

If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because a child reaches 18 during the pendency of the proceeding.[17]

When does ICWA not apply?

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child.[18]
- A voluntary placement that does not prohibit the child's parent/Indian custodian from regaining custody upon demand. "Upon demand" means upon simple verbal request without any formalities or contingencies.[19]
- A placement based upon an act which, if committed by an adult, would be deemed a crime.[20]

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[10] 25 U.S.C. § 1903(1)(i).
[11] 25 U.S.C. § 1903(1)(ii).
[12] 25 U.S.C. § 1903(1)(iii).
[13] 25 U.S.C. § 1903(1)(iv).
[14] 25 C.F.R. § 23.103(a)(iii).
[15] 25 C.F.R. § 23.103(a)(ii); In Idaho, the Department and the parent(s), prior to the removal of the child or the filing of a Petition under the CPA, may enter into an agreement known as a safety plan agreement, also known as a voluntary placement agreement, in which the parent(s) agree that the family will accept services and the child will be placed in an out-of-home placement. ICWA does not apply in these situations because the parent(s) can demand return of the child at any time.
[16] 25 U.S.C. § 1922.
[17] 25 C.F.R. § 23.103(d).
[18] 25 U.S.C. § 1903(1).
[19] 25 C.F.R. § 23.2.
[20] 25 U.S.C. § 1903(1).

11.3 THE IMPACT OF ICWA ON A CPA CASE

A. Voluntary Placement of an Indian Child: Stipulations and Parental Consent

ICWA imposes procedural protections to ensure that parent's consent to foster care placement is voluntary. Where any parent or Indian custodian voluntarily consents to a foster care placement, the consent must be "executed in writing and recorded before a judge." The judge must certify that the terms and consequences of the consent were "fully explained in detail *and were fully understood* by the parent or Indian custodian."[21] Furthermore, the judge must certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or custodian understood. Consents to voluntary placement of an Indian child may not be given prior to or within 10 days after the child's birth.[22]

Pursuant to the BIA Regulations, the written consent must clearly set forth any conditions to the consent. The consent should contain:

- the name and birthdate of the Indian child,
- the name of the Indian child's tribe,
- the tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the tribe,
- the name, address and other identifying information of the consenting parent or Indian custodian,
- the name and address of the person or entity, if any, who arranged the placement, and
- the name and address of the prospective foster parents if known.[23]

The BIA Regulations contain specific requirements to determine that the terms and consequences of consent were fully explained and understood. The regulations require that "[p]rior to accepting the consent the court must explain to the parent or Indian custodian: 1) The terms and consequences of the consent in detail; and 2) [that] [t]he parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned . . .."

The BIA Regulations further require that before accepting a voluntary consent, the court must require the participants to state on the record whether the child is an Indian child or whether there is reason to believe that the child is an Indian child.[24] Furthermore, if there is reason to know the child is an Indian child, the court must ensure that the Department has taken all reasonable steps to verify the child's status. If the court has

[21] 25 U.S.C. § 1915 (emphasis added); 25 C.F.R. § 23.125.
[22] *Id.*
[23] 25 C.F.R. § 23.126.
[24] 25. C.F.R. § 23.124. Curiously, C.F.R. § 23.124 refers to the "reason to believe" standard as opposed to the "reason to know" standard. The section specifically cross-references C.F.R. § 23.107 which establishes the "reason to know" standard.

reason to know that the voluntary placement involves an Indian child, it must comply with the ICWA placement preferences.[25]

In order to withdraw a consent to a foster care placement, the parent or Indian custodian must file a written document with the court or otherwise testify before the court making the request to withdraw the consent. Other methods of withdrawing consent permitted by state law are also appropriate. If the original placement was a voluntary placement, the court must ensure that the child is returned to the parent or Indian custodian as soon as practicable.[26]

One result of these requirements is that parental stipulations to placement of the child during the pendency of a foster care proceeding cannot be treated as "voluntary placements" under ICWA. Moreover, parental stipulations cannot bind the child's tribe which is either a party or eligible to intervene in every ICWA case. For this reason the court should always be careful to make the required ICWA findings supported by facts in the record and should not rely on parental stipulations.

B. Shelter Care Hearing

ICWA assumes that an emergency removal proceeding and a child custody proceeding might be separate cases. Thus the act and the BIA Regulations refer to the initiation of a child custody proceeding after an emergency removal.[27] Under Idaho law, unless the child is removed from the home as part of a proceeding under the Juvenile Corrections Act, the emergency removal and child custody proceeding would be part of the same child protection case – the shelter care hearing is the hearing on the emergency removal, while the adjudicatory hearing begins the child custody proceeding.[28]

At the shelter care hearing when a child is removed, a court must determine whether it has reason to know the child is an Indian child. If the court determines that there is reason to know the child is an Indian child, the court must immediately apply ICWA's emergency removal standards and the child should be treated as an Indian child until the court determines that the child is not an Indian child.[29] At the shelter care hearing, the court may order an emergency removal from the parent or Indian custodian only to prevent imminent physical damage or harm to the child.[30]

An emergency removal of an Indian child must terminate as soon as the risk of imminent physical damage or harm is over and, in any case, should not be continued beyond 30 days without making new findings discussed later in this section.[31] These

[25] 25 C.F.R. § 23.126.
[26] 25 C.F.R. § 23.127.
[27] *See, e.g.* 25 U.S.C. § 1922 and § 1912(e); 25 C.F.R. § 23.113.
[28] 81 F.R. 38821 (June 14, 2016).
[29] 25 U.S.C. § 1922, 25 C.F.R. § 23.113.
[30] 25 C.F.R. § 23.113.
[31] 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e).

ICWA findings must be made in addition to any findings required by state and other federal law discussed in Chapter 4 of this Manual.

1. Procedural considerations related to ICWA at the Shelter Care Hearing

a. Exclusive Jurisdiction

ICWA provides that tribal courts have *exclusive* jurisdiction over any child custody proceeding involving an Indian child domiciled within the reservation of the tribe asserting jurisdiction.[32] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[33] In addition, the tribal court retains exclusive jurisdiction over any Indian child who remains a "ward" of the tribal court, notwithstanding the child's domicile.[34] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Mississippi Band of Choctaw Indians v. Holyfield*.[35]

Domicile is broadly defined for purposes of ICWA. The BIA regulations define domicile as follows:

> (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
> (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.[36]

For purposes of ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[37] Thus, the reservation includes any territory within the exterior boundaries of the reservation, including fee-held land, any dependent Indian community, and any Indian allotment and the rights-of-way running through them.

Despite what appears to be clear language in ICWA, ambiguity regarding the exclusivity of tribal court jurisdiction exists in states that have assumed jurisdiction granted by Public Law 280.[38] Public Law 280 is a separate piece of federal legislation

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[32] 25 U.S.C. § 1911(a) (The only potential exception to exclusive jurisdiction for reservation domiciled Indian children arises if a state has assumed jurisdiction under Public Law 280); 18 U.S.C. § 1162. See discussion of P.L. 280 below.
[33] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990). Many tribes have procedures for transferring the case to the child's tribe.
[34] 25 U.S.C. § 1911(a).
[35] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[36] 25 C.F.R. 23.2 (definition of "Domicile").
[37] 25 U.S.C. § 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act; *See* 25 C.F.R. §23.2 (definition of "Reservation").
[38] 67 Stat. 588 (1953).

from ICWA. Public Law 280 is a 1950's Congressional enactment granting states the option to extend their criminal jurisdiction over reservations within their borders. In 1963, Idaho used the authority granted to it by Congress to "assume and accept" jurisdiction over limited areas of the law, including "dependent, neglected and abused children" in Indian country located in Idaho.[39] Thus, Idaho is considered a "partial" Public Law 280 state.

Such state jurisdiction did not displace existing tribal jurisdiction, but is assumed to be concurrent to the tribe's jurisdiction. This concurrent jurisdiction appears to conflict with the tribe's exclusive jurisdiction conferred in ICWA.[40] However, because ICWA was adopted after P.L. 280, and because ICWA's explicit purpose was to address the very specific problem of Indian children being placed at extremely disproportional rates in non-Indian foster and adoptive placements without benefit of tribal input, ICWA jurisdictional provisions should control. However, in the only federal court decision to consider the apparent conflict between P.L. 280 and ICWA, the Ninth Circuit determined that the exclusive jurisdiction provisions of ICWA were not intended to displace concurrent state court jurisdiction under P.L. 280 for a mandatory P.L. 280 state, specifically, California.[41]

b. State Court Emergency Jurisdiction

State courts may exercise jurisdiction over children who are not domiciled on a reservation. They may also exercise emergency temporary jurisdiction if a child domiciled on the reservation is temporarily residing off the reservation in order to prevent immediate physical damage or harm to the child.[42] In either case, ICWA and the BIA Regulations provide that such a temporary emergency placement should "terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child."[43] Moreover, ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with ICWA, transfer jurisdiction to the appropriate tribe, or restore the child to the parent or Indian custodian.[44]

c. Notice

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[39] IDAHO CODE ANN. § 67-5101 (2010).
[40] 25 U.S.C. § 1911(a).
[41] Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). *Doe* originated in California, a mandatory P.L. 280 state, while Idaho is not a mandatory state. The Court's reading of P.L. 280 and ICWA has been criticized. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][b][ii] n. 107 (2005)(reviewing the case and concluding that "[t]he Ninth Circuit's reading is questionable"). For a discussion of *Doe v. Mann* in light of Idaho law, *see* Clay Smith, *Doe v. Mann: The Indian Child Welfare Act, the Rooker-Feldman Doctrine, and Public Law 280*, THE ADVOCATE, Feb. 2006 at 14; Jake J. Allen, *Chipping away at the Indian Child Welfare Act: Doe v. Mann and the Court's "1984" Interpretation of ICWA and PL 280*, unpublished student paper, available at https://www.law.msu.edu/indigenous/papers/2007-03.pdf (last visited May 3, 2018).
[42] 25 U.S.C. § 1922.
[43] *Id.*
[44] *Id.*

An emergency proceeding, such as a shelter care hearing, is governed by ICWA but is not a child custody proceeding under the Act. Thus the ICWA statutory notice is not required for an emergency proceeding.[45] If possible, however, the Department should attempt to contact the tribe if there is reason to know that the child is an Indian child and the child's tribe is known.[46] Where the tribe is present at the shelter care hearing it may participate in the proceeding. State law requirements regarding notice for a shelter care hearing also apply.[47]

d. Termination of the Emergency Removal Proceeding

The state court may terminate the emergency removal proceeding by transferring the Indian child to the jurisdiction of the child's Indian tribe. The child may stay in a particular placement if the tribe chooses to keep that placement upon exercising jurisdiction.[48]

2. Who should be Present

In addition to those who would normally be present at a shelter care hearing, the following persons should be present at a shelter care hearing involving an Indian child if possible:

- Parents. "Parent" is defined by ICWA as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom."[49] ICWA specifically provides that the term "parent" does "not include the unwed father where paternity has not been acknowledged or established."[50] Thus, putative fathers who have acknowledged paternity, but who have not yet established paternity are considered parents for purposes of ICWA.
- Indian custodian or other custodial adults. ICWA defines "Indian custodian" as "any 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 of such child."[51] Thus, where tribal law or custom recognizes that a third party has legal custody pursuant to an informal process, the third party is an Indian custodian.[52] For example, another relative such as an aunt or grandparent may be caring for the child and be the Indian custodian.

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[45] 81 F.R. 38819 (June 14, 2016).
[46] *Id.*
[47] I.C. § 16-1615.
[48] 81 F.R. 38820 (June 14, 2016).
[49] 25 U.S.C. § 1903(9).
[50] *Id.*; 25 C.F.R. 23.2.
[51] 25 U.S.C. § 1903(6) & § 1912; 25 C.F.R.§ 23.2.
[52] Many tribal codes are available online and can be consulted to determine whether an individual would be recognized as an Indian custodian under tribal law. However, many tribes recognize Indian custodians as a matter of tribal customary law and practice.

- Extended relatives, as defined by the child's tribe, other tribal members, or other Indian families who may serve as a placement resource for the child. ICWA provides that the term "extended family member" is "defined by the law or custom of the Indian child's tribe."[53] If the tribe has not codified a definition of "extended family member," ICWA provides that an extended family member is "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."[54]
- Qualified expert witness, if possible. In an emergency situation it may not be possible to immediately find a qualified expert witness in time for the shelter care hearing, but once the court has determined that removal is necessary to prevent imminent physical damage or harm to the child, it is required to "expeditiously initiate" the adjudicatory hearing subject to all ICWA hearing requirements to determine if clear and convincing evidence exists that removal or placement is still necessary to prevent serious emotional damage or harm to the child, which would require a qualified expert witness.[55]
- Tribal caseworker, if available;
- Indian child's tribe and tribal attorney, if possible;
- Interpreter, if necessary.

3. The Petition

If the child's status as an Indian child is known at the time of the shelter care hearing, or there is reason to know the child is an Indian child, the petition should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child.[56]

The petition or its accompanying documents should also contain the following information:

- The name, age, and last known address of the Indian child;
- The name and address of the child's parents and Indian custodians, if any;
- The steps taken to provide notice to the child's parents, custodians, and tribe about the emergency proceeding;
- If the child's parents and Indian custodians are unknown, a detailed explanation of the efforts that have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);
- The residence and the domicile of the Indian child;

[53] 25 U.S.C. § 1903(2) & 1915(b).
[54] *Id.*
[55] 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122.
[56] 25 C.F.R. § 23.113(d).

- If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;
- The tribal affiliation of the child and of the parents or Indian custodians;
- A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe's jurisdiction; and
- A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

4. Inquiries at the Shelter Care Hearing

a. Is the child an Indian child?

At the shelter care hearing, the court must inquire whether each participant knows or has reason to know that the child is an Indian child. This inquiry must be made at the commencement of the proceeding and all responses should be on the record. If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know.[57]

To assist the court in determining whether the child is an Indian child and to evaluate the court's jurisdiction under ICWA, the court should also make the following inquiries:

- If the child was in the custody of an Indian custodian prior to the hearing;
- If the child resides or is domiciled on a reservation or if the child is already a ward of a tribal court (regardless of domicile);
- What efforts, if any, were made by the agency to identify extended family or other tribal members or Indian families for placement of the child;
- Has the agency attempted to create a family chart or genogram, or solicited assistance from neighbors, family, or members of the Indian community who may be able to offer information;[58]
- Do the parents or Indian custodian understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

The BIA Regulations provide that a court has reason to know the child is an Indian child under the following circumstances:

- Any participant in the proceeding, officer of the court involved in the proceeding, tribe, Indian organization or agency informs the court that the child is an Indian child;

[57] 25 C.F.R. § 23.107(a).
[58] 25 U.S.C. § 1915(b); 25 C.F.R. § 23.2(4).

- Any such participant informs the court that it has discovered information indicating that the child is an Indian child;
- The child who is the subject of the proceeding gives the court reason to know she or he is an Indian child;
- The court is informed that 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 court is informed that the child is or has been a ward of a tribal court; or
- The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

The court should also confirm (via report, declaration, or testimony) on the record that the Department is using due diligence to identify and work with all tribes in which the child may be eligible for membership and verify whether the child is in fact an Indian child.[59]

If the court knows or has reason to know the child is 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.[60]

b. Which tribe is the child's tribe?

If the evidence available at the shelter care hearing regarding the child's tribal membership is unambiguous, the court may determine the child's tribe. The child's tribe has the ultimate responsibility for determining the child's membership. In all cases the court should ensure that the record reflects the tribal verification of the child's tribe. If there is ambiguity regarding the child's tribe, it is particularly important that the court allow the verification process to proceed prior to making a determination of the child's tribal membership.

An unmarried child under the age of 18 is an Indian child under two circumstances. First, if the child is a member of a federally recognized tribe, the child is an Indian child. Second, if the child is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe, the child is an Indian child.

The determination of a child's tribal membership or eligibility for membership is solely within the jurisdiction and authority of the tribe.[61] Likewise, a tribe has sole jurisdiction to determine that the biological parent of the child is a member of the tribe. The state court may not substitute its own determination of tribal membership for the determination of a tribe. The court may rely on documentation such as membership or enrollment documents issued by the tribe.

[59] 25 C.F.R. § 23.107(a)(1).
[60] 25 C.F.R. § 23.107(a)(2).
[61] *Doe v. Shoshone Bannock Tribes, 159 Idaho 741, 367 P.3d 136 (2016).*

If the child is a member of or is eligible for membership in more than one tribe, the BIA regulations set the process for determining which tribe is the child's tribe for purposes of the ICWA proceeding. Pursuant to the regulations, the court should give deference to the tribe in which the child is already a member unless otherwise agreed by the tribes. If the child is a member of more than one tribe, the court must provide the opportunity to the tribes to determine which should be designated as the child's tribe. The court should respect the agreement of the tribes. If the tribes are unable to reach an agreement, the court should designate the tribe with which the child has the more significant contacts as the child's tribe.

If the court must designate the child's tribe because the possible tribes cannot reach an agreement, the court should take into consideration : 1) the preference of the parents for membership of the child, 2) length of past domicile or residence on or near the reservation of each tribe; 3) membership of the child's custodial parent or Indian custodian, 5) the interest asserted by each tribe in the child custody proceeding, 6) whether there has been a previous adjudication with respect to the child by a court of one of the tribes, 7) the child's self-identification if the child is of sufficient age and capacity to meaningfully self-identify.

Finally, state courts should be aware, that the child's tribe may change during the pendency of a case where the child is eligible for membership in more than one tribe.

c. Should the case be transferred to tribal court?

If an Indian child is the subject of a foster care placement proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[62] A request to transfer may be made orally on the record or in writing.

ICWA does not impose any timeframe for a request to transfer jurisdiction. The BIA Regulations provide that a request to transfer jurisdiction may be made at any stage of a proceeding and/or during each discrete proceeding. Thus, a request to transfer may be made as early as the shelter care hearing or as late as a termination of parental rights proceeding (even though no request was made during the child protection proceeding). A request for transfer may be made after termination of parental rights and prior to adoption.[63]

If a request to transfer to tribal court is made, the court must ensure that the tribal court is promptly notified in writing of the transfer request. The state court may request that the tribal court provide a timely response regarding whether the tribal court wishes to decline the transfer.

[62] 25 U.S.C. § 1911(b).
[63] 25 C.F.R. § 23.115.

Upon receipt of an appropriate request to transfer, the court must transfer the case unless the court determines that transfer is not appropriate because either parent objects to the transfer, the tribal court declines the transfer or the court finds good cause for denying the transfer.

If a party believes there is good cause to deny a transfer of the case to tribal court, the reasons for the belief must be stated orally on the record or provided in writing to the parties. The court must allow all the parties to the proceeding to present views regarding whether good cause to deny a transfer exists. For this reason, the court should hold a hearing and ensure that the reasons for the denial of transfer and the views of all the parties are on the record. The basis for the court's decision to deny transfer also should be stated orally on the record or in a written order. [64]

The BIA Regulations provide that in determining whether good cause to deny a transfer exists the court must not consider the following:

- whether the case is at an advanced stage, if the child's parents, custodian or tribe did not receive notice of the proceeding until an advanced state;
- whether there have been prior proceedings involving the child for which no petition to transfer was filed;[65]
- Whether the transfer could affect the placement of the child;
- The Indian child's cultural connections with the tribe or its reservation; or
- Socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.[66]

Once a case is transferred to tribal court, the state jurisdiction ends. The responsibility to re-consider issues such as the designation of the child's tribe lies with the tribal court to which the case was transferred.

d. If the child is an Indian child, is removal necessary to prevent imminent physical damage or harm to the child?

If the court determines that the child is an Indian child or that it has reason to know that the child is an Indian child, the shelter care hearing must be treated as an emergency removal proceeding under ICWA.

In an ICWA emergency removal the court must find on the record that the removal or placement is necessary to prevent imminent physical damage or harm to the child. The removal may only continue as long as it is necessary to prevent imminent physical damage or harm to the child. The removal must be ended and the child returned home if

[64] 25 C.F.R. § 23.118(a), (b) & (d).
[65] ICWA treats the child protection proceeding (foster care placement under ICWA) as a separate action from termination of parental rights and/or adoption. Thus, for example, when deciding whether to transfer a case in a termination of parental rights action, the fact the judge in the child protection proceeding denied transfer to tribal court does not constitute good cause.
[66] 25 C.F.R. § 23.118(c).

the removal or placement is no longer necessary to prevent such imminent physical damage or harm. The court must "promptly hold a hearing to determine whether the emergency removal continues to be necessary whenever new information indicates that the emergency has ended.[67]

In any case, the BIA Regulations provide that the emergency proceeding should not be continued for more than 30 days. Thus the adjudicatory hearing which, under Idaho law marks the beginning of the child custody proceeding under ICWA, must be held within 30 days of the shelter care hearing. If the adjudicatory hearing is not held within 30 days of the shelter care hearing, the court must either return the child home or make the following three findings: 1) returning the child home would subject the child to imminent physical damage or harm, 2), the court is unable to transfer the proceeding to the appropriate tribe, and 3) it has not been possible to schedule an adjudicatory hearing and thereby initiate a child custody proceeding.[68]

e. Have active efforts to prevent the removal of the Indian child been made?

Neither ICWA nor the BIA Regulations require this finding to be made at the shelter care hearing (the ICWA emergency removal hearing). However, the court is required to make this finding at the adjudicatory hearing which must be held within 30 days of the emergency proceeding. The standard for evaluating the Department's efforts to prevent removal is higher under ICWA than under state law. For this reason, if the court has reason to know that the child is an Indian child, it should make inquiry into the efforts that have been made to prevent removal. This requirement of ICWA is discussed in detail in the adjudicatory hearing section of this chapter.

f. Does the child's placement comply with the ICWA placement preferences?

As with the active efforts, this finding is not required at the shelter care hearing. However, in 30 days at the adjudicatory hearing, the court must make a finding that the child's placement complies with ICWA's placement preferences or that clear and convincing evidence of good cause to depart from the placement preferences is present. If the court has reason to know that the child is an Indian child, it should make inquiry into the child's placement. If the child is placed in an ICWA compliant placement at the onset of the case, it is less likely that the placement will need to be changed later in the process.

g. Key ICWA findings and decisions at the shelter care hearing

- Is there reason to know the child is an Indian child?
    - The record of the hearing should show that the court inquired whether each participant had reason to know the child is an Indian child.

[67] 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e).
[68] 25 C.F.R. § 23.113(e).

  - If the evidence is sufficient at the shelter care hearing, the court should determine whether the child is an Indian child.
  - If there is reason to know that the child is an Indian child but the evidence is not sufficient for the court to make a determination that the child is an Indian child, the court must:
    - Instruct each party to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.
    - Confirm on the record through a report, affidavit or testimony whether the Department has used due diligence to identify and work with all the tribes where the child may be a member or eligible for membership.
    - Treat the child as an Indian child unless and until it can be determined that the child is not an Indian child.
- If the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If the child is an Indian child, the court has jurisdiction, and the evidence of the child's tribal membership is unambiguous, in which tribe is the child a member or eligible for membership?
- If the child is a member or eligible for membership in more than one tribe, is there unambiguous evidence as to which tribe will be treated as the child's tribe for purposes of ICWA?
- If the child is an Indian child and either the parent, Indian custodian or tribe has requested a transfer to tribal court, should the case should be transferred to tribal court?
  - If the court grants a request to transfer the case, orders that are necessary to ensure smooth transfer of court records and the child's custody.
  - If the request to transfer is denied, what is the good cause to deny transfer?
- Is removal necessary to prevent imminent physical damage or harm to the child?

C. Adjudicatory Hearing

1. Who should be present

The same persons discussed at the shelter care hearing should also be present at the adjudicatory hearing. By the time of the adjudicatory hearing, the child's status as an Indian child is much more likely to be resolved. At a minimum it is more likely that a court will have reason to know that a child is an Indian child even if there is still insufficient evidence on which to base a determination of the child's status. If the court has reason to know the child is an Indian child, it must treat the case as an ICWA case. This means that the child's tribe should be present, and that a Qualified Expert Witness (QEW) must be present. The court cannot make the necessary finding of serious emotional or physical damage without the testimony of a qualified expert witness.

2. Inquiries the court must make at the adjudicatory hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, the court must make the same inquiries at the adjudicatory hearing as are required at the shelter care hearing. These are discussed above. BIA Guidelines B.7 suggests that once the verification process has been triggered a court should make an independent determination of whether a child is an Indian child only after a Tribe has failed to respond to multiple requests for verification of the child's membership/citizenship status.[69]

b. Has the Department sent the ICWA-compliant notice?

ICWA imposes specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. Pursuant to these requirements, if the identity of the child's parent, Indian custodian or tribe is known, the Department (the party seeking the foster care placement) must directly notify the parents, Indian custodian and tribe by registered or certified mail (return receipt requested) of the pending child custody proceedings and their right of intervention. The tribal notice must be sent to each tribe in which the child may be a member or eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court. [70] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers, if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- 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 and the name and address of petitioner's attorney;
- A statement that any parent or Indian custodian of the child has the right to intervene if they are not already a party to the proceeding;
- A statement that the tribe may intervene at any time in the state court proceeding;
- A statement that if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigence by the court, the parent or Indian custodian has the right to court-appointed counsel;
- A statement of the right to up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the parent or Indian custodian and the Indian child's tribe to petition for transfer of the case to tribal court;

[69] BIA Guidelines B.7.
[70] 25 C.F.R. § 23.11 (a).

- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- An explanation of the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian;
- And a statement that all parties must keep confidential the information contained in the notice.[71]

If the identity or location of the child's parents, Indian custodian or the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate BIA Regional Director.[72] In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[73]

If there is reason to know that a parent or Indian custodian possesses limited English proficiency and is not likely to understand the notice, the court must provide language access services as required by Title VI of the federal Civil Rights Act and other federal laws.[74]

The notice must be received by the parent, Indian custodian or tribe at least 10 days prior to the adjudicatory hearing (which is the ICWA child custody proceeding.) The parents, custodian and/or tribe may each request 20 additional days from the date notice was received to prepare for the proceeding.[75]

c. Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful?

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[76] The legislative history of ICWA makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Regulations provide that "prior to ordering an involuntary foster-care placement or termination of parental rights the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[77]

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[71] 25 C.F.R. § 23.111(d).
[72] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).
[73] 25 C.F.R. § 23.11(a).
[74] 25 C.F.R. § 23.111(f).
[75] 25 U.S.C. § 1912(a); 25 C.F.R. § 23.112 (a).
[76] The Adoption and Safe Families Act of 1997 (Public Law 105-89).
[77] 25 C.F.R. § 23.120. This provision appears to limit the scope of a 2013 U.S. Supreme Court case, Adoptive Couple v. Baby Girl, 570 U.S. 637(2013). In *Adoptive Couple*, the Court held that the active efforts requirement

The regulations define active efforts as follows:

> "Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
>
> Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:
>
> 1. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
> 2. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
> 3. Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
> 4. 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 Indian child's parents;
> 5. 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;
> 6. Taking steps to keep siblings together whenever possible;
> 7. Supporting regular visits 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;
> 8. 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;
> 9. Monitoring progress and participation in services;

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applies when a child is removed from a family member who has a legally recognized relationship with the child. Thus, active efforts were not required in a case where a child was placed for voluntary adoption over the objection of an unwed father who had not established parental rights pursuant to state law and who had never had any form of custody of the child.

10. 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;
11. Providing post-reunification services and monitoring."[78]

The BIA Regulations require that active efforts must be documented in detail in the record.[79]

Neither ICWA nor the BIA Regulations include a specific provision regarding the burden of proof applicable to the "active efforts" requirement. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. In 2015, the Idaho Supreme Court held: "that a party seeking termination of parental rights with respect to an Indian child 'shall satisfy' the court that active efforts to prevent the breakup of the family have been made, not that the party show by clear and convincing evidence that such efforts have been made."[80]

d. Is there clear and convincing evidence, including the testimony of one or more qualified expert witnesses, demonstrating that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child?

Compared to state law, ICWA requires a heightened evidentiary standard, a more difficult substantive standard and a specialized expert witness to support the foster care placement of an Indian child. These requirements are the heart of ICWA's policy to prevent the unnecessary removal of Indian children from their parents and tribe. The Act requires that the Department show that the foster care placement of an Indian child must be supported by clear and convincing evidence, including the testimony of a QEW, and that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[81] The BIA Regulations specifically provide that the evidence of serious emotional or physical damage must be causally linked to the particular conditions in the home. Evidence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not meet the burden of proof for serious emotional and physical harm.[82] Given the ICWA standard for removal, parental unfitness, abandonment and/or unstable home environment under the Idaho CPA are not automatic grounds for removal of an Indian child *unless* the facts show a causal link to danger to the child.

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[78] 25 C.F.R. § 23.2.
[79] 25 C.F.R. § 23.120.
[80] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015). The BIA Guidelines state that while the regulations do not establish a burden of proof for active efforts, "the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided." BIA Guidelines E.6.
[81] 25 U.S.C. § 1912(e).
[82] 25 C.F.R. § 23.121.

The legislative history of ICWA establishes that a qualified expert must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[83] Congress envisioned that the qualified expert would be more than a social worker.[84] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices and to provide testimony regarding the specific tribal context and the child's situation.

The BIA Regulations provide that the QEW "must be 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. A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe."[85] Furthermore, the regulations provide that either the court or a party may request the assistance of the Indian child's tribe or the BIA office serving the child's tribe in locating qualified persons to serve as expert witnesses. The regulations specifically state that the social worker assigned to the case may not serve as the qualified expert witness.[86]

In *In the Matter of Baby Boy Doe,*[87] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness involving an Indian child from a different tribe. This case was decided before the current regulations were issued.

e. Is the child's placement within the placement preferences required by ICWA?

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[88] In *Holyfield,* the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[89] Congress recognized that even where the child was removed from his or her parents or Indian custodians, the

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[83] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[84] *Id.* at 21.
[85] 25 C.F.R § 23.122.
[86] *Id.*
[87] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).
[88] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests 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, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[89] Holyfield, 490 U.S. at 36.

child's best interests and the interests of the tribe are served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[90]

The placement of an Indian child at the adjudicatory hearing implicates the ICWA placement preferences for foster care and pre-adoptive placements. ICWA establishes different placement preferences for proceedings involving adoptive placements. These foster care and pre-adoptive placement preferences apply to both voluntary and involuntary placements of the Indian child, to pre-adoptive placements, and to placements made in contemplation of termination of parental rights.[91] ICWA requires that the child be placed in the "least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home."[92]

In determining the suitability of a placement, the test is whether the placement is within the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides" or with which the parent or extended family "maintain social or cultural ties."[93] The ICWA foster care placement preferences apply even where the child has not previously resided in an Indian family.

The BIA Regulations further provide that "[T]he child must be placed in the least restrictive setting that: (1) Most approximates a family taking into consideration sibling attachment; (2) Allows the Indian child's special needs (if any) to be met; and (3) Is in reasonable proximity to the Indian child's home, extended family and siblings."[94]

In the absence of good cause to the contrary, ICWA and the BIA Regulations impose the following placement preferences for foster care and pre-adoptive placements, in the order of their applicability:[95]

- A member of the Indian child's extended family as defined by ICWA.[96]
- A foster home licensed, approved, or specified by the child's tribe.
- An Indian foster home licensed or approved by an authorized non-Indian agency, or
- An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[97]

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[90] 25 U.S.C. § 1902. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that these preferences may not apply in a voluntary adoption situation where the child has not been removed from a recognized family member and no one is before the court who meets the preferred placement criteria offering to serve as a placement for the child. Adoptive Couple, 570 U.S. at 743. The BIA Regulations, issued after the case was decided, make clear that this does not change the general rule that the preferences apply to both voluntary and involuntary placements. 25 C.F.R. § 23.129.
[91] 25 U.S.C. § 1915(b).
[92] 25 U.S.C. § 1915.
[93] 25 U.S.C. § 1915(d).
[94] 25 C.F.R. § 23.131.
[95] 25 C.F.R. § 23.131.
[96] 25 U.S.C. § 1903(2).
[97] 25 U.S.C. § 1915(b).

ICWA permits tribes to change the placement preferences by resolution and requires that state courts adhere to the tribally altered preferences. The tribal resolution must comply with ICWA's mandate that the placement be the "least restrictive setting."[98] Tribal resolutions and enactments regarding placement preferences can often be found on the appropriate tribal website.

ICWA and the BIA Regulations also provide that the court must, where appropriate, consider the wishes of the Indian child or the Indian child's parents for placement.[99]

f. If the child's placement is not within the ICWA placement preferences, is there clear and convincing evidence of good cause to depart from the preferences?

ICWA provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. An assertion of good cause to depart from the preferences by any party must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the preferences must establish good cause by clear and convincing evidence. The court must make its finding of good cause to depart from the preferences on the record and in writing.[100]

The BIA Regulations provide that the court's decision to depart from the preferences should be based on one or more of the following considerations:

- The request of one of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- The presence of a sibling attachment that can be maintained only through a particular placement;
- The extraordinary physical, mental or emotional needs of the Indian child such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find a placement meeting the placement preference criteria. The regulations specify that for purposes of this provision the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Finally, the BIA regulations provide that a placement may not depart from the preferences based on the relative socioeconomic status of the placement compared to one that complies with the preferences. Nor may a placement depart from the preferences "based solely on

[98] 25 U.S.C. § 1915(c); 25 C.F.R. § 23-131.
[99] 25 C.F.R. § 23.131.
[100] 25 C.F.R. §23.132.

ordinary bonding and attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[101]

h. Key ICWA findings and decisions at the adjudicatory hearing

- If the child's status as an Indian child has not yet been determined, is there reason to know the child is an Indian child? See Key Findings and Decisions at the Shelter Care Hearing regarding the child's status as an Indian child.
- If the child is an Indian child or if there is reason to know the child is an Indian child, has ICWA compliant notice been given with copies to the BIA, and have copies with proof of delivery been filed with the court?
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the Tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, which tribe(s) is the child a member or eligible for membership in?
- See Key Findings and Decisions at the Shelter Care Hearing regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.

- Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful? An affidavit documenting the active effort made by the Department must be submitted.
- Is there clear and convincing evidence, including the testimony of one or more qualified expert witnesses 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?.
- Is the child's placement within the placement preferences required by ICWA?
- If the child's placement is not within the placement preferences, is there clear and convincing evidence of good cause to depart from the placement preferences?

D. Amended Disposition Hearing

When the child is removed from protective supervision an amended disposition hearing is held. [102] The removal and redisposition of the case does not begin a new child protection proceeding under state law, but does trigger the required IV-E and ICWA findings.

When the child is removed from protective supervision, the amended disposition hearing must be treated as an emergency removal proceeding. If the child's status as an Indian child was not previously determined, the court must make the ICWA findings required for the shelter care hearing. Within 30 days of the amended disposition hearing

[101] 25 C.F.R. §23.139. Even if the placement was not in violation of ICWA, BIA Guidelines H.5 provides that courts and agencies should carefully consider whether the child's relationship with a non-preferred placement outweighs the long-term benefits of maintaining connections with the family and tribal community.
[102] I.C. § 16-1623.

the court also must make the required active efforts and serious emotional damage or harm findings.

E. Case Plan Hearing and Review Hearings

1. Inquiries to be made at the case plan, review and permanency hearings.

a. Is the child an Indian child?

The child's status as an Indian child will hopefully have been determined by this point in the case. If new information has been disclosed by one of the parties or has otherwise become available such that the court has reason to know the child is an Indian child, the court must make this determination before proceeding further with the case. See the shelter care hearing and adjudicatory hearing sections of this chapter for information on making the determination of the child's status as an Indian child.

The inquiry regarding the child's status as an Indian child must be made at every hearing until the record contains sufficient evidence for the court to make a finding. Even if the child was not initially identified as possibly being an Indian child, if information comes to light during the case such that any of the participants know or have reason to know that the child may be an Indian child, the court must immediately begin treating the child as an Indian child and move to resolve the question of the child's status as quickly as possible.

b. Is the child's placement still within the ICWA placement preferences?

If the child's placement has changed since the time of the adjudicatory hearing, the court must ensure that the child's current placement is within the ICWA placement preferences. If the child's placement has changed to a non-preferred placement, the court should determine whether there is good cause to deviate from the placement preferences either before or immediately after the placement changes. These preferences are detailed in the adjudicatory hearing section of this chapter. If the child's placement is not within the preferences, the court should order the Department to locate a placement that complies with ICWA or should require that the Department establish by clear and convincing evidence that there is good cause to depart from the placement preferences. The good cause requirement is also discussed in the adjudicatory section of this chapter.

c. What are the active efforts that will be made to enable the child to return home?

The case plan sets forth the efforts that will be made by the Department to enable the child to return home. If the child is an Indian child, these efforts must meet the active efforts requirement of ICWA. The active efforts requirement is discussed in the adjudicatory hearing section of this Chapter. The court should ensure that the efforts contemplated by the case plan will be sufficient to meet the active efforts standard.

d. Is the child's alternate plan and/or permanency goal termination of parental rights and adoption?

If the concurrent plan and/or permanency goal is termination of parental rights and adoption, the Department must prepare for the heightened standards of ICWA. In a termination of parental rights proceeding, ICWA imposes a beyond a reasonable doubt burden of proof to show that the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage. The concurrent plan or permanency goal of termination of parental rights and adoption may not be realistic in an ICWA case, given this extremely high burden of proof. The court should enquire into whether the planning for the higher requirements for termination of parental rights has been taken into consideration. The court should also consider whether guardianship is a viable option. Establishing and working on a realistic concurrent plan and permanency goal is important if the child is not able to be reunified with his or her parents of Indian custodian.

F. Termination of Parental Rights

1. Who should be present

The same persons discussed at the adjudicatory hearing should also be present at the termination of parental rights hearings. By the time of a proceeding to terminate parental rights, the child's status as an Indian child is more likely to be resolved. If facts arise at this point in the case giving any participant reason to know the child is an Indian child, the court must treat the case as an ICWA case and move quickly to resolve the child's status. The sections of this chapter regarding the shelter care hearing and adjudicatory hearings contain detailed discussions of the requirements for making a determination of the child's status. If there is reason to know that the child is an Indian child, the child's tribe should be present, and a Qualified Expert Witness should be present.

2. Inquiries the court must make at the termination of parental rights hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, but the court has reason to know that the child is an Indian child, it must make the same inquiries at the termination of parental rights proceeding as are required at the shelter care hearing. These are discussed above.

b. Has the Department sent the ICWA-compliant notice?

ICWA and the BIA Regulations impose specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. The termination of parental rights proceeding is a new action and ICWA compliant notice of this action must be provided. Pursuant to these

requirements, if the identity of the child's parent, Indian custodian or tribe is known, the Department (the party seeking the termination of parental rights) must directly notify the parents, Indian custodian and tribe by registered or certified mail (return receipt requested) of the pending child custody proceedings and their right to intervene. The tribal notice must be sent to each tribe of which the child reasonably may be a member or of which the child may be eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court.[103] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- 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 and the name and address of petitioner's attorney;
- A statement that any parent or Indian custodian of the child has the right to intervene if they are not already a party to the proceeding;
- A statement that the tribe may intervene at any time in the state court proceeding;
- A statement that if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigence by the court, the parent or Indian custodian has the right to court-appointed counsel;
- A statement of the right to up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the parent or Indian custodian and the Indian child's tribe to petition for transfer of the case to tribal court;
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- An explanation of the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian; and
- A statement that all parties must keep confidential the information contained in the notice.[104]

If the identity or location of the child's parents, Indian custodian or the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate BIA Regional Director.[105] This does not relieve the Department of the responsibility of

[103] 25 C.F.R. § 23.11(a).
[104] 25 C.F.R. § 23.111(d).
[105] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).

providing notice to the child's tribe. However, the regional BIA office may be able to provide information on which tribes to contact. In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[106]

If there is reason to know that a parent or Indian custodian possesses limited English proficiency and is not likely to understand the notice, the court must provide language access services as required by Title VI of the Federal Civil Rights Act and other federal laws.[107]

The notice must be received by the parent, Indian custodian or tribe at least 10 days prior to the hearing on the petition to terminate parental rights (which is a child custody proceeding under ICWA). The parents, custodian and/or tribe may request 20 additional days from the date notice was received to prepare for the proceeding.[108]

c. Should the case be transferred to tribal court?

If an Indian child is the subject of a termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe may request that the case be transferred to tribal court.[109] A request to transfer may be made orally on the record or in writing. This request may be made at any time during the proceeding. The fact that a request to transfer was not made during the earlier phases of the child protection proceeding does not bar a transfer at the time of the parental termination proceeding.[110]

ICWA does not impose any timeframe for a request to transfer jurisdiction. The BIA Regulations provide that a request to transfer jurisdiction may be made at any stage of a proceeding and/or during each discrete proceeding. Thus a request to transfer may be made as early as the shelter care hearing or as late as a termination of parental rights proceeding (even though no request was made during the child protection proceeding).[111]

If a request to transfer to tribal court is made, the court must ensure that the tribal court is promptly notified in writing of the transfer request. The state court may request that the tribal court provide a timely response regarding whether the tribal court wishes to decline the transfer.

Upon receipt of an appropriate request to transfer, the court must transfer the case unless the court determines that transfer is not appropriate because either parent

[106] 25 C.F.R. §23.11(a).
[107] 25 C.F.R. § 23.111(f).
[108] 25 U.S.C. §1912(a); 25 C.F.R. § 23.112(a)
[109] 25 U.S.C. § 1911(b).
[110] 25 C.F.R. § 23.115 and § 23.118(c)(2).
[111] 25 C.F.R. § 23.115.

objects to the transfer, the Tribal court declines the transfer or the court finds good cause for denying the transfer.

If a party believes there is good cause to deny a transfer of the case to tribal court, the reasons for the belief must be stated orally on the record or provided in writing to the parties. The court must allow all the parties to the proceeding to present views regarding whether good cause to deny a transfer exists. For this reason the court should hold a hearing and ensure that the reasons for the denial of transfer and the views of all the parties are on the record. The basis for the court's decision to deny transfer should be stated orally on the record or in a written order. [112]

The BIA Regulations provide that in determining whether good cause to deny a transfer exists the court must not consider the following:

- whether the case is at an advanced stage, if the child's parents, custodian or tribe did not receive notice of the proceeding until an advanced state;
- whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether the transfer could affect the placement of the child;
- The Indian child's cultural connections with the tribe or its reservation; or
- Socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.[113]

Once a case is transferred to tribal court, the state court's jurisdiction ends. The responsibility to re-consider issues such as the designation of the child's tribe lies with the tribal court to which the case was transferred.

d. Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so, were these efforts successful?

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under state law and the Adoption and Safe Families Act.[114] The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that the efforts be culturally relevant. The BIA Regulations provide that "prior to ordering an involuntary foster-care placement or termination of parental rights the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[115]

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[112] 25 C.F.R. § 23.118(a), (b) & (d).
[113] 25 C.F.R. § 23.118(c).
[114] 25 C.F.R. § 23.106 and BIA Guidelines A.1.
[115] 25 C.F.R. § 23.120. This provisions appears to reverse the impact of a 2013 U.S. Supreme Court case, Adoptive Couple v. Baby Girl, 570 U.S. 637(2013). In *Adoptive Couple*, the Court held that the active efforts requirement

The regulations define active efforts as follows:

"Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

1. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
3. Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
4. 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 Indian child's parents;
5. 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;
6. Taking steps to keep siblings together whenever possible;
7. Supporting regular visits 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;
8. 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;
9. Monitoring progress and participation in services;
10. 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;
11. Providing post-reunification services and monitoring."[116]

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applies when a child is removed from a family member who has a legally recognized relationship with the child. Thus, active efforts were not required in a case where a child was placed for voluntary adoption over the objection of an unwed father who had not established parental rights pursuant to state law and who had never had any form of custody of the child.

[116] 25 C.F.R. § 23.2.

The BIA Regulations require that active efforts be documented in detail in the record.[117]

Neither ICWA nor the BIA Regulations include a specific provision regarding the burden of proof applicable to the "active efforts" requirement. In 2015, the Idaho Supreme Court held: "that a party seeking termination of parental rights with respect to an Indian child 'shall satisfy' the court that active efforts to prevent the breakup of the family have been made, not that the party show by clear and convincing evidence that such efforts have been made."[118]

e. Is there evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses 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?.

ICWA requires that the Department show that the termination of parental rights regarding an Indian child must be supported by evidence beyond a reasonable doubt demonstrating that continued custody by the child's parent or Indian custodian likely to result in serious emotional or physical damage to the child. As with foster care proceedings, this showing must include the testimony of a qualified expert witness. The BIA Regulations specifically provide that by itself, evidence of serious emotional or physical damage is not enough to meet the standard so it must be causally linked to the particular conditions in the home. Evidence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not meet the burden of proof for serious emotional and physical harm.[119] Given the ICWA standard for removal, parental unfitness, abandonment and/or unstable home environment under Idaho's Termination of Parent-Child Relationship Statute are not automatic grounds for removal of an Indian child *unless* the facts show a causal link to serious emotional or physical damage to the child.

ICWA requires that the court's finding of likely serious emotional or physical damage to a child be supported by the testimony of a qualified expert witness.[120] The legislative history of the ICWA establishes that a qualified expert witness must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[121] Congress envisioned that the qualified expert would be more than a social worker.[122] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices and to provide testimony regarding the specific tribal context and the child's situation.

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[117] 25 C.F.R. 23.120.
[118] Idaho Dept. of Health & Welfare v. Doe, 157 Idaho 920, 342 P. 3d 632 (2015).
[119] 25 C.F.R. § 23.121.
[120] 25 U.S.C. § 1912(e).
[121] *To Establish Standards for the Placement of Indian Children in Foster or Adopted Homes, To Prevent the Breakup of Indian Families, and For Other Purposes*, H. REP. NO. 95-1386 at 22 (1978).
[122] *Id.* at 21.

The BIA Regulations provide that the QEW "must be 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. A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe."[123] Furthermore, the regulations provide that either the court or a party may request the assistance of the Indian child's tribe or the BIA office serving the child's tribe in locating qualified persons to serve as expert witnesses. The regulations specifically state that the social worker assigned to the case may not serve as the qualified expert witness.[124]

In *In the Matter of Baby Boy Doe,*[125] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness involving an Indian child from a different tribe. However, this case was decided before the current regulations were issued.

f. Key ICWA findings and decisions at the termination of parental rights hearing

- Is there reason to know the child is an Indian child? See Key Findings and Decisions at the shelter care hearing in this chapter regarding the child's status as an Indian child.
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, in which tribe is the child a member or eligible for membership?
- See Key Findings and Decisions at the shelter care hearing in this chapter regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.
- Has the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family? If so were these efforts successful? An affidavit documenting the active effort made by the Department must be submitted
- Is there evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, 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?

G. Adoption

1. Who should be present

[123] 25 C.F.R § 23.122.
[124] *Id.*
[125] In the Matter of Baby Boy Doe, 127 Idaho 452, 902 P. 2d 477 (1996).

- Judge
- Adoptive Parents
- Caseworker if one was assigned
- Tribal caseworker or representative
- Guardian *ad litem* for the child;
- The child

2. Inquiries to be made at the Adoption Hearing

a. Is the child an Indian child?

If the child's status as an Indian child has not yet been determined, but the court has reason to know that the child is an Indian child, it must make the same inquiries at the adoption proceeding as are required at the shelter care hearing. These are discussed above.

b. Has the Department sent the ICWA-compliant notice?

ICWA and the BIA Regulations impose specialized notice requirements in any involuntary proceedings where the child is an Indian child or there is reason to know the child is an Indian child. The adoption proceeding is a new action and ICWA compliant notice of this action must be provided. In an adoption proceeding connected to a CPA proceeding, the parental rights of the parents will have already been terminated, so notice to the parents and/or Indian custodian is not required. However pursuant to the BIA regulations, if the identity of the child's tribe is known, the prospective adoptive parent (the party(s) seeking the adoption) must directly notify the tribe by registered or certified mail (return receipt requested) of the pending adoption and the tribe's right of intervention. The tribal notice must be sent to each tribe in which the child may be a member or is eligible for membership. An original and a copy of each notice together with return receipts or other proof of delivery must be filed with the court.[126] The notice must contain:

- The child's name, birthdate, and birthplace;
- All names know (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers if known;
- The names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known;
- 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 and the name and address of petitioner's attorney;
- A statement that the tribe may intervene at any time in the state court proceeding;

[126] 25 C.F.R. § 23.11 (a).

- A statement of the right to, up to 20 additional days to prepare for the child custody proceedings;
- A statement of the right of the Indian child's tribe to petition for transfer of the case to tribal court;
- The mailing addresses and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under the BIA Regulations;
- And a statement that all parties must keep confidential the information contained in the notice.[127]

If the identity or location of the tribe in which the child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, the notice must be sent to the appropriate BIA Regional Director.[128] In every case, a copy of the notices must be sent to the appropriate BIA Regional Director with return receipt requested or by personal delivery.[129]

c. Does the adoptive placement comply with the ICWA placement preferences for adoption?

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture."[130] In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[131] Congress recognized that even where the child was placed for adoption, the child's best interests and the interests of the tribe would be served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[132]

Thus, in the absence of good cause to the contrary, ICWA and the BIA Regulations impose the following placement preferences for adoptive placements, in the order of their applicability:[133]

- A member of the Indian child's extended family as defined by ICWA.[134]
- Other members of the Indian child's tribe.

[127] 25 C.F.R. § 23.111(d).
[128] The appropriate regional directors are listed in 25 C.F.R. § 23.11(b).
[129] 25 C.F.R. § 23.11(a).
[130] 25 U.S.C. § 1902 (The Congress hereby declares that it is the policy of this Nation to protect the best interests 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, and by providing for assistance to Indian tribes in the operation of child and family service programs.).
[131] Holyfield, *supra* note 44, at 36.
[132] 25 U.S.C. § 1902. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that these preferences may not apply in a voluntary adoption situation where the child has not been removed from a recognized family member and no one is before the court who meets the preferred placement criteria offering to serve as a placement for the child. Adoptive Couple, 570 U.S. at 741.
[133] 25 C.F.R. § 23.130.
[134] 25 U.S.C. § 1903(2).

- Other Indian families.[135]

ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally altered preferences. [136] Tribal resolutions and enactments regarding placement preferences can often be found on the appropriate tribal website.

ICWA and the BIA Regulations also provide that the court must, where appropriate, consider the wishes of the Indian child or the Indian child's parents for placement.[137]

e. If the child's placement is not within the ICWA placement preferences, is there good cause to depart from the preferences?

ICWA provides that courts may deviate from the placement preferences only upon a showing of "good cause" to do so. An assertion of good cause to depart from the preferences by any party must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the preferences must establish good cause by clear and convincing evidence. The court must make its finding of good cause to depart from the preferences on the record and in writing.[138]

The BIA Regulations provide that the court's decision to depart from the preferences should be based on one or more of the following considerations:

- The request of one of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- The presence of a sibling attachment that can be maintained only through a particular placement;
- The extraordinary physical, mental or emotional needs of the Indian child such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find a placement meeting the placement preference criteria. The regulations specify that for purposes of this provision the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

[135] 25 U.S.C. § 1915(b); 25 C.F.R. §23-130.
[136] 25 U.S.C. § 1915(c); 25 C.F.R. §23-131.
[137] 25 C.F.R. § 23.130.
[138] 25 C.F.R. § 23.132.

Finally, the BIA regulations provide that a placement may not depart from the preferences based on the relative socioeconomic status of the placement compared to one that complies with the preferences. Nor may a placement depart from the preferences "based solely on ordinary bonding and attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[139]

f. Key ICWA findings and decisions at the adoption hearing

- Is there reason to know the child is an Indian child? See Key Findings and Decisions at the shelter care hearing in this chapter regarding the child's status as an Indian child.
- If there is sufficient evidence that the child is an Indian child, is the child domiciled on the reservation such that the tribal court has exclusive jurisdiction?
- If there is sufficient evidence and the court has jurisdiction, in which tribe is the child a member or eligible for membership?
- See Key Findings and Decisions at the shelter care hearing in this chapter regarding how to resolve the child's possible membership in more than one tribe and requests to transfer the case to tribal court.
- Is the adoptive placement within the ICWA placement preferences for adoption?
- If the placement departs from the adoptive placement preferences, is there clear and convincing evidence of good cause to depart from the placement preferences.

[139] 25 C.F.R. § 23.139.