

# INDIAN CHILD WELFARE ACT (ICWA)

## *Bench Card*

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

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

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

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

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

### **JURISDICTION <sup>3</sup>**

1. Exclusive Jurisdiction: Pursuant to ICWA, the tribe has exclusive jurisdiction if a child resides or is domiciled on the reservation or is a ward of the tribal court, except where such jurisdiction is otherwise vested in the state by existing federal law.
2. Concurrent Jurisdiction: All other ICWA cases have concurrent state and tribal court jurisdiction.
3. Transfer Jurisdiction: Upon request of a parent, the Indian custodian, or the tribe, the state court must transfer jurisdiction to the tribal court unless: 1) a parent objects; 2) the tribal court declines; or 3) the state court finds good cause not to transfer. Request to transfer may be made at any stage of the proceedings. The burden of establishing good cause to the contrary is on the party opposing the transfer.
4. Emergency Jurisdiction: A state court may take temporary, emergency jurisdiction for a child who resides on the reservation while a child is off reservation if clearly necessary to prevent the child from suffering imminent risk of abuse or neglect. Jurisdiction shall terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. If the child cannot be transferred to the tribe or returned safely to the parent, the case may proceed in state court in compliance with ICWA requirements for a child custody proceeding.<sup>4</sup>
5. Intervention: If the case remains in state court, the tribe can intervene at any stage of the proceedings.

### **EMERGENCY PROCEEDING**

1. Does any participant know or have reason to know the child is an Indian child? This inquiry must be made of each party throughout the life of the case until the child's status is determined. All responses must be on the record.<sup>5</sup>

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2. Has a request been made to transfer the case to tribal court? If the case is not transferred, has a party opposing transfer shown that there is good cause to deny transfer?<sup>6</sup>
3. Is removal necessary to prevent imminent physical damage or harm to the child?<sup>7</sup>

### **NOTICE OF CHILD CUSTODY PROCEEDING<sup>8</sup>**

Where **Idaho Department of Health and Welfare either knows or has reason to know that the child may be an Indian child**, notice of the child custody proceeding must be provided in accordance with ICWA, even if no conclusive determination has been made that ICWA is applicable.

1. Notice must be given to the child's parents, Indian custodian and the child's tribe by registered mail or by personal delivery. Copies of notices must be given to the regional office of the BIA.
2. The Notice must identify the child, and include:
  - a) a copy of the petition,
  - b) the name and address of petitioner and their counsel,
  - c) a statement regarding right to intervene,
  - d) appointment of counsel,
  - e) location and other information regarding court, including next hearing date/time,
  - f) right to seek transfer,
  - g) potential future legal consequences regarding custodial rights, and
  - h) information regarding confidentiality.

### **TIMING<sup>9</sup>**

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

### **APPOINTMENT OF COUNSEL<sup>10</sup>**

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

### **FINDINGS**

In addition to any state law, findings and federal findings required under ASFA, there are two additional findings the court must make in an ICWA case (in a CPA case at the adjudication and in a TPR case at the termination trial). If necessary, a separate ICWA hearing can be set to address these issues. These findings cannot be waived or found by way of stipulation.

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1. **Active Efforts Finding:** The state must show that **active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.**<sup>11</sup> “Active efforts” is defined in the BIA Regulations as “affirmative, active, thorough, and timely efforts to maintain or reunite a child with his or her family.”<sup>12</sup> Aggravating circumstances is not an exception to the active efforts requirement.
2. **Serious Physical or Emotional Harm Finding Supported by the Testimony of a Qualified Expert Witness:** The state must show, by **clear and convincing evidence** in a CPA case, and **beyond a reasonable doubt** in a termination of parental rights proceeding including testimony of a **qualified expert witness**, that **continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**<sup>13</sup>

Who qualifies as an expert?<sup>14</sup>

1. A person qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.
2. A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the child's tribe.

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

## **PLACEMENT PREFERENCES**<sup>15</sup>

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

1. **Foster Care or Pre-adoptive Placement:** The child must be placed in the least restrictive setting which most approximates a family and meets any special needs of the child. A preference must be given, in absence of good cause to the contrary, to placement with (in the following order):
  - a. A member of the Indian child's extended family;
  - b. A foster home licensed or approved or specified by the Indian tribe;
  - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - d. An institution for children approved by an Indian tribe.
2. **Adoptive Placement:** A preference must be given, in absence of good cause to the contrary, to placement with:
  - a. A member of the child's extended family;
  - b. Other members of the Indian child's tribe;
  - c. Other Indian families.
3. **Good Cause to Deviate:** Request of biological parent or child of sufficient age; 2) presence of a sibling attachment maintained only through a particular placement; 3) extraordinary physical or emotional needs of the child (need expert testimony); 4) unavailability of suitable families for placement after diligent search. Burden is on party seeking deviation.<sup>16</sup>

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## ENDNOTES

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<sup>1</sup> 25 U.S.C. § 1902.

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

<sup>3</sup> 25 U.S.C. §§ 1911 and 1922; 25 C.F.R. § 23.110

<sup>4</sup> 80 F.R. 10146 § C.3(d).

<sup>5</sup> 25 C.F.R. § 23.107(a)

<sup>6</sup> 25 U.S.C. § 1911(b); 25 C.F.R. § 23.115

<sup>7</sup> 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e)

<sup>8</sup> 25 U.S.C. § 1912 and 25 C.F.R. § 23.112.

<sup>9</sup> 25 U.S.C. § 1912(a).

<sup>10</sup> 25 U.S.C. § 1912(b).

<sup>11</sup> 25 U.S.C. § 1912(d).

<sup>12</sup> 25 C.F.R. § 23.2 (definition of “active efforts”).

<sup>13</sup> 25 U.S.C. § 1912 (e) and (f); 25 C.F.R. § 23.121.

<sup>14</sup> 25 C.F.R. § 23.122.

<sup>15</sup> 25 U.S.C. § 1915, and 25 C.F.R. §§ 23.129 – 23.132.

<sup>16</sup> 25 C.F.R. § 23.132.