

Quick Reference Sheet for State Agency Personnel in Involuntary Proceedings*



U.S. Department of the Interior, Bureau of Indian Affairs Final Rule: Indian Child Custody Proceedings 25 CFR 23

Inquiry. The court will ask at the beginning of each child-custody proceeding:

Do you know, or is there a reason to know, the child is an “Indian child” under the Indian Child Welfare Act (ICWA)?

An “Indian child” is:

- A member of a federally recognized Tribe or
- Eligible for membership in a federally recognized Tribe and has a biological parent who is a member.

Indications of “reason to know” include—

- Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child;
- The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village;
- The child is, or has been, a ward of Tribal court; or
- Either parent or the child has an ID indicating Tribal membership.

Whether a child is an “Indian child” does not consider factors outside the statutory definition, such as:

- Participation of the parents or the Indian child in Tribal activities;
- Relationship between the Indian child and his or her parents;
- Whether the parent ever had custody of the child, or
- The Indian child’s blood quantum.

Pending verification. The court will treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child” under the Indian Child Welfare Act (ICWA).

Due diligence to identify “Indian child’s Tribe” and verify membership/eligibility. Use due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is a member **or** a biological parent is a member and the child is eligible for membership.

Inquire as to domicile and residence. The court will look at whether the Indian child’s domicile or residence is on a reservation **or** the child is a ward of Tribal court to determine whether the Indian child’s Tribe has exclusive jurisdiction.

Use and document *active efforts* to prevent the breakup of the family. You must use active efforts to prevent the breakup of the family. Before ordering an involuntary foster care placement or termination of parental rights (TPR), the court must conclude that active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful. The court will require active efforts to be documented in detail in the record.

Active efforts are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. See 25 CFR § 23.2 for the more expansive definition and examples.

If an emergency removal under State law is necessary. An emergency removal or placement is any removal/placement of an Indian child under State law without the full suite of ICWA protections, regardless of the label used for the removal or placement, and is permitted to prevent “imminent physical damage or harm” to the child. Any emergency removal or placement of an Indian child:

- **Must terminate** immediately when the removal or placement is no longer necessary to prevent “imminent physical damage or harm” to the child and
- **Cannot last more than 30 days** unless the court makes certain determinations.

An emergency proceeding can be terminated by one or more of the following actions:

- (1) Initiation of a child-custody proceeding subject to the provisions of ICWA (e.g., providing notice);
- (2) Restoring the child to the parent or Indian custodian; or
- (3) The court transfers of the child to the jurisdiction of the appropriate Indian Tribe.

Notice. Provide clear and understandable notice to the parents (and/or Indian custodian, if any) and Tribe, by registered or certified mail, return receipt requested, of the involuntary proceeding, and maintain proof that the notice was given (i.e., the return receipts and copies of notice). The court will not hold a foster-care-placement or TPR proceeding until at least **10 days after receipt** of the notice of that particular proceeding (with extensions allowed at option of parent or Tribe).

Standards of Evidence. The court will order foster-care placement or TPR only if there is:

- **Clear and convincing evidence** (for foster-care placement) or **evidence beyond a reasonable doubt** (for TPR),
- Including the testimony of qualified expert witness(es),
- 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.

The evidence must show a **causal relationship** between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence.

The **qualified expert witness** may not be the social worker regularly assigned to the Indian child. The Indian child's Tribe may designate an individual as a qualified expert witness and you may seek the Tribe's or BIA's assistance in identifying a qualified expert witness.

Placement Preferences. Seek to identify placements that meet ICWA's placement preferences (or the Indian child's Tribe's placement preferences established by resolution, if applicable). The court will apply the placement preferences in any preadoptive, adoptive, or foster-care placement of an Indian child.

**ICWA's top preferred placement is a member of the Indian child's extended family.
For the remaining preferences, see 25 U.S.C. 1915 or 25 CFR §§ 23.129-131.**

The court will allow for deviations of the placement preferences only for *good cause* described on the record. Good cause should be shown by clear and convincing evidence and based on one or more of the considerations at § 23.132(c). Note that a prerequisite to finding good cause based on the *unavailability* of a suitable preferred placement is that a diligent search for suitable preferred placements must have been conducted. The standards for determining whether a placement is *unavailable* must conform to the prevailing social and cultural standards of the Indian community.

A placement may not depart from the preferences:

- Based on the socioeconomic status of any placement relative to another placement
- Based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

*Any proceeding that is not "voluntary" under the regulations is involuntary. A proceeding is "voluntary" only if either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.