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INDIAN CHILD WELFARE ACT

JUDICIAL BENCHBOOK

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The National Council of Juvenile and Family Court Judges® (NCJFCJ) provides cutting-edge training, wide-ranging technical assistance, and research to help the nation’s courts, judges, and staff in their important work. Since its founding in 1937 by a group of judges dedicated to improving the effectiveness of the nation’s juvenile courts, the NCJFCJ has pursued a mission to improve courts and systems practice and raise awareness of the core issues that touch the lives of many of our nation’s children and families.

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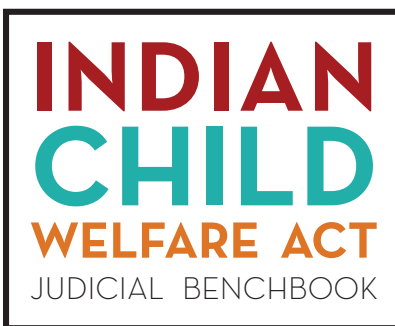
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**INDIAN
CHILD
WELFARE ACT**
JUDICIAL BENCHBOOK

ENDORSED AND SUPPORTED BY:





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OVERVIEW

Congress passed the Indian Child Welfare Act (ICWA) in 1978 in response to the wholesale removal of Indian children from their families. Congressional findings memorialized in ICWA included “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” 25 U.S.C. § 1901(4) 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.” 25 U.S.C. § 1901(5)

In 2003, the National Council of Juvenile and Family Court Judges (NCJFCJ) published its first-ever checklists to guide judges and judicial officers in implementing ICWA. The checklists have been highly utilized by courts across the nation. Viewed as a priority, the NCJFCJ Board of Directors also passed a resolution in support of full implementation of ICWA in 2013.

The Department of Interior, Bureau of Indian Affairs (BIA) promulgated federal regulations governing ICWA in 2016. 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 create the minimum federal requirements for Indian families. States may increase protections and requirements, but may not decrease them beneath the floor created by the law. 25 C.F.R § 23.101; 25 C.F.R. § 23.106 This benchbook is designed for a national audience and only addresses the federal requirements. Judges should check their own jurisdictions to determine if state law provides higher protections for Indian children and families.

In response to these changes, this benchbook was created to build upon the original checklists with updated language to be consistent with the statute, regulations, and best practices, commonly promoted by the NCJFCJ.

Courts should always remember, “[t]he Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children...” 25 U.S.C. § 1902 The standards of ICWA are considered the gold standard for children and families.

In passing the Indian Child Welfare Act (ICWA), the clear intent of Congress was to “protect the best interest of Indian children and to promote the stability and security of Indian tribes and families.” 25 U.S.C. § 1902 Oversight and enforcement authority regarding the provisions of ICWA was left to judges presiding over child custody cases.

Since the passage of ICWA in 1978, policies and procedures for implementation and application of ICWA’s remedial provisions have varied across the country and within individual states. The disproportionate numbers of American Indian and Alaska Native children in our child welfare system persist almost 40 years after ICWA became law. Consequently, the new ICWA Rules and Regulations (25 C.F.R. §§ 23.1 - 144) were enacted in 2016 to promote the uniform application of ICWA and to advance and protect Indian children’s best interests.

The revised ICWA judicial benchbook was developed to provide judicial officers with necessary and thorough information to assist with cases involving American Indian or Alaska Native children. As “inquiring magistrates”, juvenile and family court judges provide vital judicial leadership by making necessary inquiries at every stage of a child custody case. The revised benchbook will encourage incisive questions that elicit detailed answers in support of each finding required by federal law and the Regulations.

Our American Indian and Alaska Native children are essential to the security and stability of each tribe. In each ICWA proceeding the judicial officer and other court professionals should be mindful that children are the heart of the law. Committed uniform application of ICWA and the Regulations will advance and protect the best interests of each child and enhance tribal security and stability.

THE HONORABLE JOHN J. ROMERO, JR.

SECOND JUDICIAL DISTRICT COURT, CHILDREN’S COURT DIVISION, ALBUQUERQUE, NEW MEXICO
PRESIDENT-ELECT, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES

A woman wearing a cowboy hat is sitting in a field of tall grass, holding a young child. She is holding a small woven object in her right hand. The entire image has a reddish-brown tint.

i.

INDIAN CHILD WELFARE ACT (ICWA) BASICS



i. INDIAN CHILD WELFARE ACT (ICWA) BASICS

THE CHILD IS AN “INDIAN CHILD” UNDER THE INDIAN CHILD WELFARE ACT (ICWA) IF:

- He or she is an unmarried person under the age of 18, **and**
- 1. The child is a member of a federally recognized Indian tribe; **or**
- 2. a) Eligible for membership in a federally recognized Indian tribe **and**
- 2. b) Is the biological child of a member/citizen of a federally recognized Indian tribe. 25 U.S.C. § 1903(4)

DETERMINATION OF TRIBAL MEMBERSHIP:

- 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 documents or testimony indicating membership.
- If the child can be a member of more than one tribe:
 - Deference should be given 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 should be designated;
- If the tribes are unable to reach an agreement, the tribe with which the child has more significant contacts. 25 C.F.R. § 23.109

WHEN DOES ICWA APPLY?

- The proceedings are child custody proceedings as defined in 25 U.S.C. § 1903(1); and
- The court knows or has reason to know the child is an “Indian child.” 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. 25 U.S.C. § 1903(1)(i)

- **Termination of parental rights** 25 U.S.C. § 1903(1)(ii)
- **Pre-adoptive placements** 25 U.S.C. § 1903(1)(iii)
- **Adoptive placements** 25 U.S.C. § 1903(1)(iv)
- **Status offenses** 25 C.F.R. § 23.103(a)(iii)
- **Voluntary proceedings** – a proceeding that could prohibit the parent or Indian custodian from regaining custody upon demand. 25 C.F.R. § 23.103(a)(ii)
- **Emergency proceedings** – this includes any time a child is removed on an emergency basis from the home. 25 U.S.C. § 1922

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. 25 C.F.R. § 23.103(d)

WHEN DOES ICWA *NOT* APPLY?

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child. 25 U.S.C. § 1903(1)
- 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. 25 C.F.R. § 23.2
- A placement based upon an act which, if committed by an adult, would be deemed a crime. 25 U.S.C. § 1903(1)



DEFINITIONS:

Active efforts – 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. 25 C.F.R. § 23.2

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. 25 C.F.R. § 23.2

Bureau of Indian Affairs (BIA) – Indian Affairs (IA) is the oldest bureau of the United States Department of the Interior. The BIA's mission is to: "...enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve



the trust assets of American Indians, Indian tribes, and Alaska Natives."¹

Domicile – 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. 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. 25 C.F.R. § 23.2

Extended family member – Defined by the law or custom of the Indian child’s tribe, or in the absence of such law or custom, is a person who has reached the age of 18 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. 25 U.S.C. § 1903(2)

Indian child’s tribe – The Indian tribe in which an Indian child is a member or eligible for membership, or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe described in 25 C.F.R. § 23.109 (the Indian tribe with which the Indian child has the more significant contacts). 25 U.S.C. § 1903(5)

Indian custodian – Any person who has legal custody of an Indian child under tribal law or custom or under state law; or to whom temporary physical care has been transferred by the part of the child. 25 C.F.R. § 23.2

Indian tribe – Any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians. 25 U.S.C. § 1903(8)

Qualified expert witness – A person who will testify that the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child at both the foster care hearing and termination of parental rights, 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 child’s tribe. The court or any party may request the assistance of the child’s tribe in locating persons qualified to serve as expert witnesses. The witness cannot be the social worker assigned to the case. 25 U.S.C. § 1912 (e) & (f); 25 C.F.R. § 23.122(a)



¹ Bureau of Indian Affairs <https://www.bia.gov/about-us>.



ii.

**PRELIMINARY
PROTECTIVE
HEARING**





ii. PRELIMINARY PROTECTIVE HEARING

At the initial hearing when a child is removed, if a court determines during the hearing it has reason to know the child involved is an Indian child, the court should immediately apply emergency standards under 25 U.S.C. § 1922.

EMERGENCY REMOVAL

If the child resides or is domiciled on the reservation but is temporarily off the reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child up to 30 days (except in extraordinary circumstances). 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e)

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults;

25 U.S.C. § 1903(6); 25 U.S.C. § 1912

- Extended relatives, as defined by child’s tribe, other tribal members, or other Indian families who may serve as placement resource for child; 25 U.S.C. § 1903(2); 25 U.S.C. § 1915(b)
 - Qualified expert witness; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122
-

In an emergency situation it may not be possible to immediately find a qualified expert witness, 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” a child custody proceeding 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. 25 U.S.C. § 1922; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.113



- Assigned caseworker;
- Tribal caseworker if available;
- Agency attorney;
- Attorney for parents;
- Attorney or representative for child’s Indian tribe;
- GAL/CASA or advocate for the child;²
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child’s extended relatives.

COURT CAN MAKE SURE PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in language understandable to each party and witness.

- Requiring notice to include reason for removal; purpose of hearing; availability of legal assistance; right to intervene for parents, guardians, Indian custodians, and the child’s tribe.
- Requiring caseworkers to encourage attendance of parents, Indian custodians, and other parties.

In emergency hearings, none of these actions may be possible, but judges can inform agency workers that these actions will be required for upcoming hearings.

FILING THE PETITION:

- A sworn petition or complaint should be filed at or prior to the time of the preliminary protective hearing.
- The petition should be complete and accurate.
- If the petition is filed at the time or immediately before (24-72 hours) of the hearing, the court must use the evidentiary standard set forth in 25 U.S.C. § 1922.

2 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child’s tribe, or who is familiar with and respectful of the child’s cultural needs.



A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, 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. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child; (2) The name and address of the child's parents and Indian custodians, if any; (3) The steps taken to provide notice to the child's parents, custodians, and tribe about the emergency proceeding; (4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov); (5) The residence and the domicile of the Indian child; (6) 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; (7) The tribal affiliation of the child and of the parents or Indian custodians; (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action; (9) 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 (10) 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. 25 C.F.R. § 23.113(d)

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) 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. *Id.*
- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by the child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail return receipt requested) was



received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional Bureau of Indian Affairs (BIA) office. 25 C.F.R. § 23.111(e)

- If a copy of the notice was sent to the regional BIA office. 25 C.F.R. § 23.11
- If the child was in the custody of an Indian custodian prior to the hearing. 25 U.S.C. § 1903(6)
- 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). If any of these apply, the tribal court has exclusive jurisdiction and the state court must expeditiously notify the tribal court. 25 U.S.C. § 1911(a); 25 C.F.R. § 23.110(a)
- 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? 25 U.S.C. § 1915(b); 25 C.F.R. § 23.2(4)
- 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?

- **If there is reason to know the child is an Indian child, but there is not yet sufficient evidence or notice was not sent prior to the hearing, the court must:**
 - Apply the standard of 25 U.S.C. § 1922 to determine if the child should remain in state care and inquire if the removal is required to prevent imminent physical damage or harm to the child. Is the removal or placement necessary to prevent imminent physical damage or harm to the child? This must be on the record. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)
 - Determine if there is new information that indicates the emergency removal or placement is no longer necessary? If so, the emergency removal or placement must terminate immediately. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(a)
 - Expeditiously schedule a child custody proceeding under 25 U.S.C. § 1912.
 - Confirm (report, declaration, or testimony) on the record that the agency or other party is using due diligence to identify and work with all tribes where the child may be eligible for membership and verify whether the child is in fact a member (or the parent is a member and the child is eligible).



25 C.F.R. § 23.107(a)(1)

- 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. 25 C.F.R. § 23.107(a)(2)

If the proceeding is an emergency proceeding under 25 U.S.C. § 1922, the court must decide if the Indian child should be returned home because the threat of imminent physical harm passed or the tribal court asserted jurisdiction. If the child remains in care, the court must expeditiously schedule a hearing in conformity with 25 U.S.C. § 1912(e).

KEY DECISIONS THE COURT MUST MAKE:

- If either the parent or tribe has requested transfer to tribal court, the court shall transfer the proceeding. 25 U.S.C. §

TRANSFER IS NOT ALLOWED IF: Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117

GOOD CAUSE MAY NOT INCLUDE:

(1) Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)

1911(b)

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)
- Did the agency or party use due diligence to identify and work with all the tribes where the child may be a member or eligible for membership? This must be confirmed in the record. 25 U.S.C. § 23.107(b)(1)
- Did the agency make active efforts to prevent the breakup of the Indian family?³ 25 U.S.C. § 1912(e)
- Has the agency made a diligent search to identify responsible extended family or other tribal members or Indian families to serve as a placement for the child, if necessary? 25 U.S.C. § 1915(b); 25 C.F.R. § 23.132(c)(5)

³ For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.



- Is it in the best interest of the child to appoint counsel for the child? 25 U.S.C. § 1912(b)
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary of Interior upon appointment of counsel so that reasonable fees and expenses may be appropriated? 25 U.S.C. § 1912(b)
- Is the child placed within the placement preferences as required by 25 U.S.C. § 1915(b)? In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside, or with which the parent or extended family maintain social and cultural ties? 25 U.S.C. § 1915(d)
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?

- What are the terms and conditions of family time by parents or Indian custodian?

REQUIRED NOTICE AND ADVICE OF RIGHTS:

- Review notice to missing parties and relatives.
- Serve parties with a copy of the petition.
- Advise parties of their rights.
- Advise the parent and/or Indian custodian that they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
- Advise the parents of the content of the petition, their right to examine reports and other documents under 25 U.S.C. § 1912(c), their rights to request an additional 20 days to prepare for the hearing under 25 U.S.C. § 1912(a), and all admonitions necessary to explain the consequences of failing to comply with the Adoption and Safe Families Act and state statutory requirements to prevent the filing and adjudication of a Petition to Terminate Parental Rights. These admonitions would also include an explanation of the grounds for a Termination of Parental Rights proceeding. This should be repeated in each subsequent hearing held after the Preliminary Hearing.



- Advise the Indian custodian of his/her right to be a full party to the case. 25 U.S.C. § 1911(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the child's parent if he/she is not at the hearing. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the Indian custodian if he/she is not at the hearing. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the child's tribe. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)

SUBMISSION OF REPORTS TO THE COURT:

- The court should require submission of agency and/or law enforcement reports at least one hour prior to the hearing.
- Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent the need for removal.

KEY WRITTEN FINDINGS THE COURT MUST MAKE:

- Whether at the time of removal, the child lives or is domiciled on a reservation or is already a ward of a tribal court thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Whether at the time of removal, the child was in the custody of an Indian custodian. 25 U.S.C. § 1903(6)
- Whether the removal or placement is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)

If all notice was properly done prior to the hearing:

- Whether active efforts were made prior to removal to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Whether there was clear and convincing evidence, supported by the 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. 25 U.S.C. § 1912(e)
- Whether the parent, Indian custodian, or child's tribe requested an additional 20 days to prepare for the hearing. 25 U.S.C. § 1912(a)



IF THE CHILD IS PLACED OUTSIDE OF THE HOME:

- Specify why the removal or placement is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)
 - Alternatively, specify why, under the clear and convincing evidence standard 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, and what active efforts were done to prevent the removal. 25 U.S.C. § 1912(e)
 - Specify whether the child is to be placed in a home that meets the priority placement preferences mandated by 25 U.S.C. § 1915(b):
 - A member of the Indian child's extended family;
 - A foster home licensed, approved, or specified by the Indian child's tribe;
 - An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
 - If the child is not to be placed within the priority placements mandated by 25 U.S.C. § 1915(b), specify whether:
 - The child's tribe issued a resolution establishing a different preferred order and the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)
- OR**
- There is good cause not to follow the placement preferences.⁴ 25 U.S.C. § 1915(a)
 - Order the agency to make ongoing, diligent search efforts to locate a placement that meets the preferences established within ICWA.
 - Specify the terms of family time with the parent(s), Indian custodian, and extended family.
 - Order the agency to arrange for the child to visit with other tribal members if no extended family is available and to coordinate with the child's tribe to arrange for the child to attend significant cultural and familial events.



⁴ For a more detailed definition of good cause, see *iii. Adjudication Hearing*.

iii.

ADJUDICATION HEARING



iii. ADJUDICATION HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe; 25 U.S.C. § 1903(2)
- Qualified expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney for parents or Indian custodian;
- Attorney or representative for child's tribe;
- GAL/CASA or advocate for the child;⁵
- Court reporter; and

- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court

⁵ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



if they subsequently receive information that provides reason to know. *Id.*

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a) & (b)
- Where the child is currently placed and if the placement is within the placement preferences required by law.

KEY DECISIONS THE COURT SHOULD MAKE ON THE RECORD:

- Whether the child is, or the court has reason to know the child is an Indian child as defined by ICWA. 25 U.S.C. § 1903(4); 25 C.F.R. § 23.107(a)
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court or is either domiciled on or resides within the reservation. 25 U.S.C. § 1911(a)
- Which allegations of the petition have been proved or admitted.
- Whether there is a legal basis for continued court and agency intervention.
- Whether the agency made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful?⁶ 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120(b)
- If a request is made to transfer the case to tribal court, whether or not the case will be transferred. 25 U.S.C. § 1911(b)



6 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

TRANSFER IS NOT ALLOWED IF: *Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117*

GOOD CAUSE MAY NOT INCLUDE: *(1) Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)*

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)
- Whether the parent or Indian custodian is able to read English.

ADDITIONAL DECISIONS THE COURT MAY NEED TO MAKE ON THE RECORD:

- Depending on the length of time between the adjudication and next hearing, the judge will need to make temporary decisions at the conclusion of the adjudication, such as:
 - Determine where the child is to be placed and whether the child is placed within the placement preferences under 25 U.S.C. § 1915(b), and if not, whether the child's tribe issued a resolution establishing a different preferred order, as long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)
 - If any party asserts that good cause not to follow the placement preferences exists, the reason for that belief or assertion must be stated orally on the record or provided in writing to the parties to the proceeding and the court.⁷ 25 C.F.R. § 23.132(a)
 - The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is good cause to depart from placement preferences. 25 C.F.R. § 23.132(b)

⁷ For more detailed information about placement preferences, see *ii. Permanency Planning Hearing* pp. 18.



If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

In addition, “(c) A court’s determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both 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; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) 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; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, 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.”

“(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.”

“(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” 25 C.F.R. § 23.132

-
- Order any necessary testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing and ensure that all assessments or evaluations are culturally appropriate.
 - Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family or, if no family member is available, other tribal members or other Indian families to serve as caretakers.



- Order an alleged perpetrator to stay out of the family home and have no contact with the child.
- Direct the agency to continue its efforts to notify non-custodial parents, including unwed fathers whose paternity has been acknowledged or established. 25 U.S.C. § 1903(9)
- Set terms for family time, support, and other intra-family communication including parent-child and sibling visits when the child is in foster care prior to disposition.
- Transmit a copy of the decision to place the Indian child in foster care to the BIA, Division of Human Services. 25 U.S.C. § 1951(a); 25 C.F.R. § 23.140
- Order the state to maintain records in accordance with ICWA under 25 C.F.R. § 23.141.
- Specify what efforts, if any, have been made to identify the child's tribe.
- Specify whether the agency has mailed notice and necessary information to all tribes in which the child may be eligible for membership to enable each tribe to ascertain whether the child is either a member or eligible for membership at least 10 days prior to the hearing. 25 U.S.C. § 1912(a)
- Specify whether written notice was sent to the appropriate regional BIA office if the child's tribe is not yet known. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(e)
- Specify whether the child was in the custody of an Indian custodian at the time of removal. 25 U.S.C. § 1903(6)
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the parent or Indian custodian, registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW MUST:

- Specify whether the child is an Indian child under ICWA and, if known, whether the child's tribe has been provided adequate notice, sufficient information, and an opportunity to determine the child's membership eligibility. 25 U.S.C. § 1903(4)
- Specify whether the child either resides or is domiciled on a reservation, or is already a ward of a tribal court, thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the child's Indian tribe, if known, by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ascertain whether the child's tribe seeks to intervene in the proceedings and, if so, grant that request at any point in the proceeding. 25 U.S.C. § 1911(c) If the child is eligible for membership in more than one tribe, ascertain which tribe is



the child’s tribe for purposes of ICWA.⁸
25 U.S.C. § 1903(5); 25 C.F.R. § 23.109

- Ascertain whether the parent or Indian custodian seeks to intervene in the proceedings and, if so, grant that request at any point in the proceeding. 25 U.S.C. § 1911(c)
- If the child’s tribe, parent, or Indian custodian requested an additional 20 days in which to prepare for the hearing, grant that request and reschedule the hearing. 25 U.S.C. § 1912(a)
- Specify whether a parent, Indian custodian, or the child’s tribe has filed a motion or petition to transfer the case to tribal court. 25 U.S.C. § 1911(b)
- If the court declined to transfer the case, specify whether either parent vetoed the transfer, the tribal court declined to accept jurisdiction, or the reasons, if any, why there is good cause not to transfer the case to the tribal court. 25 U.S.C. § 1911(b)
- Specify whether the court advised the parent(s) or Indian custodian they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
- Provide sufficiently detailed information to justify why the court found by clear and convincing evidence, including the testimony of one or more 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. 25 U.S.C. § 1912(e)
- Address the placement of the child and whether it conforms with 25 U.S.C. § 1915(b).
- Provide sufficiently detailed information to justify agency and court choices for treatment and services.
- Write the order in easily understandable language so that all parties know how the court’s findings relate to subsequent case planning.
- Indicate whether the parent or Indian custodian can read English and, if not, what steps will be taken to ensure that the parent or Indian custodian understands the court’s written order.
- Set the date and time of the next hearing, and ensure all of the parties receive notice.



8 For more detailed information on how to ascertain which tribe, see *i. Indian Child Welfare Act (ICWA) Basics*.

A warm, sepia-toned photograph of two young girls smiling. The girl in the foreground is on the left, and the girl in the background is on the right. They are both wearing light-colored, possibly white, tops. The background shows a white fence and a building, suggesting an outdoor setting like a schoolyard or park. The overall mood is happy and positive.

iv.

DISPOSITION HEARING





iv. DISPOSITION HEARING

• **WHO SHOULD ALWAYS BE PRESENT:**

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe, or other tribal members or Indian families who may serve as a placement for the child; 25 U.S.C. § 1903(2)
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s) or Indian custodian;
- Attorney or representative for child's Indian tribe;
- GAL/CASA or advocate for the child;⁹
- Court reporter; and

- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

SUBMISSION OF PREDISPOSITION REPORTS TO THE COURT SHOULD INCLUDE:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them.
- A description of services to be provided to

⁹ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



the family, including those that the tribe or an Indian organization may offer and make available.

- A description of services being provided to ensure the child’s ongoing connection to his/her culture, including attendance at significant cultural events, while placed outside of his/her family.
- A description of actions taken by the parent(s) or Indian custodian to correct the identified problems and any steps the parent or Indian custodian has taken thus far.

WHEN THE AGENCY RECOMMENDS FOSTER PLACEMENT, AN AFFIDAVIT DOCUMENTING ACTIVE EFFORTS SHOULD BE SUBMITTED. THE FOLLOWING ARE SOME KEY ELEMENTS OF THE AFFIDAVIT:

- A description of the active efforts made by the agency to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation why these efforts were unsuccessful.¹⁰ 25 U.S.C. § 1912(d); 25 C.F.R. § 23.3.
- A description of the efforts made to coordinate with the child’s tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation if the services were unsuccessful.
- An explanation of why the child cannot be protected from the identified problems in

the home, even if services are provided to the child and family.

- An explanation of the diligent efforts made to contact the child’s extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child’s tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- A description of arrangements made by the agency to ensure family time with extended family, or, if there is no family in the area, with other tribal members, to support the child’s cultural connections.
- A description of the agency’s plan to coordinate with the child’s tribe and family to identify significant cultural and important familial events and arrange for the child’s attendance.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) 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. *Id.*
- If proper notice (registered or certified mail, return receipt requested) was

¹⁰ For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.



received at least 10 days prior to a hearing by child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1).

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT MUST MAKE:

- Whether there is a need for continued placement.
- Does the agency's proposed case plan address the needs of the child and the parent(s) or Indian custodian? Does this plan meet the requirements of active, not just reasonable efforts?
- Is the parent or Indian custodian able to read the proposed case plan and, if not, what efforts will be made to ensure that the parent or Indian custodian fully

understands the requirements of the plan?

- Is the continued removal of the child necessary to prevent serious emotional or physical damage to the child? 25 U.S.C. § 1912(e)
- Is the child placed within the placement preferences under 25 U.S.C. § 1915(b) or under the tribe's preferences?¹¹ 25 U.S.C. § 1915(c)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under federal law, unless state law provides a higher degree of protection, or unless there is a governing state-tribal agreement. 25 U.S.C. § 1921
- State the long-term plan for the child (e.g., maintenance of the child in the home of a parent or Indian custodian, reunification with a parent or Indian custodian, guardianship or permanent placement with a relative or other tribal member or Indian family, or placement of child in a permanent adoptive home).
- Document the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian child's family. 25 U.S.C. § 1912(d)
- Specify whether the child was placed



within the placement preferences under ICWA, 25 U.S.C. § 1915(b), and, if not, whether the child's tribe issued a resolution establishing a different preferred order, as long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)

- Specify whether the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside or with which the parent or extended family maintain social and cultural ties when the agency determined whether an individual is an appropriate placement for the child.
- If the child's tribe did not issue a resolution indicating a different preferred order for the placement of the child, specify whether the party seeking departure from the placement preferences met the burden of proving by clear and convincing evidence that there is good cause to deviate from the placement preferences. 25 U.S.C. § 1915(b); 25 C.F.R. § 23.132(b)

If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

In addition, "(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both 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; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) 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; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, 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."



"(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."

"(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132

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- If there is not good cause to deviate from the placement preferences, and there is no tribal resolution re-ordering the placement preferences, order the agency to move the child to a home that complies with the placement preferences. 25 U.S.C. § 1915(b)
 - If placement or services are ordered and were not agreed upon by the parties, specify the evidence or legal basis upon which the order is made.
 - If applicable, specify why continuation of the child in the home would be contrary to the child's welfare.
 - If the state's case plan conflicts with or does not meet the requirements of ICWA, disapprove or modify the agency's proposed case plan.



NOTES





v.

**REVIEW
HEARING**



v. REVIEW HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe, or other tribal members or Indian families who may serve as a placement for the child; 25 U.S.C. § 1903(2)
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney or representative for child's Indian tribe;
- GAL/CASA or legal advocate for the child;¹²
- Court reporter; and

- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including extended relatives, tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them.
- A description of services to be provided to assist the family, specifically identifying those made available with assistance from the tribe or an Indian organization.

¹² The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



- A description of services to be provided to ensure the child’s ongoing connection to his/her culture while placed outside of his/her family, including attendance at significant cultural events.
- A description of actions to be taken by the parents to correct the identified problems, and of the parents’ participation and compliance with the case plan thus far.

WHEN THE AGENCY RECOMMENDS FOSTER PLACEMENT, AN AFFIDAVIT DOCUMENTING ACTIVE EFFORTS SHOULD BE SUBMITTED. THE FOLLOWING ARE SOME KEY ELEMENTS OF THE AFFIDAVIT¹³:

- A description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child’s tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and if those efforts were not successful, an explanation why.
- An explanation of why the child cannot be protected from serious emotional or physical harm if the child remains in the home, even if services are provided to the child and family. 25 U.S.C. § 1912(e)
- An explanation of the diligent efforts made to contact the child’s extended

family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child’s tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.

- Efforts made by agency to ensure child’s visitation with extended family, or, if none is available, with other tribal members, to ensure the child’s ongoing participation in his/her culture.
- Efforts made by agency to coordinate with the child’s tribe and family to make arrangements for the child to attend significant cultural and important familial events.

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) 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. *Id.*
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child’s parent, including the putative father or Indian custodian. 25



¹³ For a complete definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)

- If proper notice (registered or certified mail, return receipt requested) received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT MUST MAKE:

- Whether there is a need for continued placement.
- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and, if so, whether the services were successful. 25 U.S.C. § 1912(d); 25 U.S.C. § 23.3
- Whether efforts were made to ensure that the parent or Indian custodian understands the case plan, especially if the parent or Indian custodian does not read English.
- Whether the court-approved, long-term

permanent plan for the child remains the best plan for the child.

- Whether the services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- Whether the child is placed according to the placement preferences in ICWA, and, if not, whether the child should be moved into a preferred placement. 25 U.S.C. § 1915(b)¹⁴
- Whether the visitation terms need to be modified.
- Whether any additional court orders need to be made to move the case toward successful completion.
- What time frame should be established for goals to achieve reunification or other permanency plan for each child.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Indicate whether the agency has identified the child's tribe.
- Specify whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)



- Specify whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child. 25 U.S.C. § 1911(c) & (d); 25 U.S.C. § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the clear and convincing evidence that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth findings as to whether family reunification and an end to court supervision continues to be the long-term case goal and why.
- Set forth detailed findings of fact and conclusions of law as to whether the agency has made active efforts to provide remedial services and rehabilitative programs designed to eliminate the need for placement outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preferred placement. 25 U.S.C. § 1915(b)
- Set forth orders for the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion, including culturally relevant services that may be available with assistance from the tribe or local Indian organization.
- Write the order in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care. An interpreter should be provided for parent or Indian custodian whose first language is not English.
- Approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review.
- Identify an expected date for final reunification or other permanent plan for the child.
- Where the state's case plan conflicts with or does not meet the requirements of ICWA, disapprove or modify the agency's proposed case plan to conform to ICWA requirements.
- Make any necessary orders to resolve the problems that are preventing reunification or the completion of another permanent plan for the child.
- Set a date and time for the next hearing, if needed.





vi.

**PERMANENCY
PLANNING HEARING**





vi. PERMANENCY PLANNING HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Relatives with legal standing or other custodial adults; 25 U.S.C. § 1903(6)
- Qualified expert witness; 25 U.S.C. § 1912(e)
- Attorney or representative for child's tribe;
- Assigned caseworker;
- Attorney for child;
- Attorney for parents or Indian custodian;
- CASA/GAL, or advocate for the child;¹⁵
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Extended family members;
- Foster parents;
- Prospective adoptive parents;
- Judicial case management staff;
- Service providers; and
- Other witnesses, including tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

- Specify the permanency relief being sought and address the issues that the judge needs to determine.
- Set forth a plan to carry out the placement decision.

¹⁵ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



- **When the petition or report requests that a child be returned home on a specific date, it should set forth:**
 - How the conditions or circumstances leading to the removal of the child have been corrected;
 - A description of actions taken by the parent(s) or Indian custodian to correct the identified problems;
 - The frequency of recent visitation and its impact on the child; and
 - A plan for the child's safe return home and follow-up supervision after family reunification.
- **When the petition or report requests termination of parental rights, it should set forth:**
 - Facts and circumstances supporting the grounds for termination;
 - A detailed description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation of why these efforts were unsuccessful;
 - A detailed description of the active efforts made to coordinate with the child's tribe or an Indian organization in assisting the Indian parent or custodian with services needed to avoid termination of parental rights and an explanation of why these efforts were unsuccessful;
 - An explanation of why the child cannot be protected from the identified problems in the home;
 - A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment with any correspondence or supporting documentation sent by the tribe to the agency;
 - A description of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families about providing an appropriate placement for the child;¹⁶
 - If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within ICWA; 25 U.S.C. § 1915(a)
 - A description of arrangements made by the agency to ensure visitation with extended family, and of all efforts made to support the child's cultural connections; and
 - A permanency plan for the child.

¹⁶ For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.



- **When another planned permanent living arrangement is proposed, the report should set forth:**
 - Facts and circumstances refuting the grounds for termination of parental rights and showing that although the child cannot be placed with parents, termination is not in the best interests of the child;
 - A description of why the planned permanent living arrangement is in the best interests of the child;
 - An explanation of the active efforts made to contact the child’s tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families to identify a culturally appropriate placement for the child;
 - If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within ICWA; 25 U.S.C. § 1915(a)
 - A description of arrangements made by the agency to ensure visitation with extended family, or, if there is no extended family, with other tribal members, to support the child’s cultural connections;
 - A summary of the agency’s understanding of the tribe’s position

regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency; and

- A plan to ensure the stability of the planned permanent living arrangement.

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS:

- When the agency recommends a permanency plan, an affidavit documenting active efforts made must be submitted. The following are some of the requisite elements of the affidavit:
 - A detailed description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why; 25 U.S.C. § 1912(d)
 - A description of the efforts made to coordinate with the child’s tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation why these services were unsuccessful;
 - An explanation of why the child cannot be protected from serious emotional or physical damage if the child remains in the home, even if services are provided to the child and family; 25 U.S.C. § 1912(e)
 - An explanation of the diligent efforts



made to contact the child’s extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child’s tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement;

- Efforts made by the agency to ensure child’s family time with extended family, or, if none is available, with other tribal members, to ensure the child’s ongoing participation in his/her culture; and
- Efforts made by the agency to coordinate with the child’s tribe and family to make arrangements for the child to attend significant cultural and important familial events.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) 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. *Id.*
- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by the child’s parent, including

the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)

- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe’s membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT SHOULD MAKE:

- Can the child be safely returned home on a specific date?
- Whether active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the family.
- If the child cannot be safely returned home, is there a placement option with a member of the child’s family, as defined by the tribe’s customs?
- If placement cannot be found within the child’s family, can placement be found with a member of the child’s tribe?
- Will the child be legally freed for adoption?



THE COURT’S WRITTEN FINDING OF FACT AND CONCLUSIONS OF LAW SHOULD INCLUDE:

- Whether the agency has identified the child’s tribe.
- Whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child’s tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)
- Whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child’s tribe with copies of the petition, reports, and information concerning the child in a timely manner. 25 U.S.C. § 1911(c) & (d); 25 U.S.C. § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent’s home or continued supervision, articulating the clear and convincing evidence that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth detailed findings of fact and conclusions of law as to whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and eliminate the need for placement of the child outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preferred placement. 25 U.S.C. § 1915(b)
- If an argument has been made that there is good cause to deviate from placement preferences, and whether the party seeking departure from the placement preferences has proven this through clear and convincing evidence.¹⁷ 25 C.F.R. § 23.132(b)
- Write the order in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care (interpreter should be provided for parent or Indian custodian whose first language is not English).
- Set forth the court’s determination of permanency and provide documentation for the plan to return home, proceed to termination of parental rights, or plan another permanent living arrangement.

17 For a more detailed definition of good cause, see *iii. Adjudication Hearing*.



NOTES





vii.

TERMINATION OF PARENTAL RIGHTS





vii. TERMINATION OF PARENTAL RIGHTS

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian; 25 U.S.C. § 1903(6)
- Qualified expert witness; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122
- Assigned caseworker;
- Caseworker or representative from child's Indian tribe;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney or representative for child's Indian tribe;
- GAL/CASA, or legal advocate for the child;¹⁸
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Domestic violence advocate for parent;
- Age-appropriate children whose testimony is required;
- Prospective adoptive parents;
- Judicial case management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders or the child's extended relatives. 25 U.S.C. § 1903(2)

INQUIRIES TO BE MADE BY THE COURT IN INVOLUNTARY PROCEEDINGS:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court

¹⁸ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child’s parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe’s membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a) & (b)

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child’s tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)
- Whether written notice was provided to the parents or Indian custodian by registered or certified mail, return receipt

requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)

- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120(a) The active efforts must be documented in detail on the record.¹⁹ 25 C.F.R. § 23.120(b)
- Whether the active efforts were unsuccessful. 25 U.S.C. § 1912(d)
- Whether efforts were made to ensure that the parent or Indian custodian understood the case plan, especially if the parent or Indian custodian does not read English.
- Whether there is evidence beyond a reasonable doubt, 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. 25 U.S.C. § 1912(f)
- If a request is made to transfer the case to tribal court, and whether or not the case will be transferred. 25 U.S.C. § 1911(b)

¹⁹ For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.



TRANSFER IS NOT ALLOWED IF: Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117

GOOD CAUSE MAY NOT INCLUDE:
(1) Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW TO TERMINATE PARENTAL RIGHTS SHOULD:

- Specify that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and that they were unsuccessful. 25 U.S.C. § 1912(d)
- Specify what evidence, including testimony of a qualified expert witness,

supports the finding beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)

- Specify any other state statutory grounds supporting termination of parental rights, if state law requires satisfaction of dual burden of proof.

INQUIRIES TO BE MADE BY THE COURT IN VOLUNTARY PROCEEDINGS:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a); 25 C.F.R. § 23.124(a)
- Whether either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to termination of parental rights in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- When the consent to termination of parental rights was given, and ensure it was not given prior to or within 10 days after the birth of the child, as consent is not valid under these circumstances. 25 U.S.C. § 1913(a)
- Whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to termination of parental rights were explained. 25 U.S.C. § 1913(d)



THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT VOLUNTARY TERMINATION OF PARENTAL RIGHTS HEARING MUST INCLUDE:

- A thorough description of the conditions and circumstances under which consent to termination of parental rights was obtained. Parental consent must be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the terms and consequences of the consent were explained in detail and that the parent or Indian custodian fully understood these terms. 25 U.S.C. § 1913(a)
- Certification that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to termination of parental rights in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certification that the consent to termination of parental rights was not given prior to or within 10 days after the birth of the child, as consent is not valid under these circumstances. 25 U.S.C. § 1913(a)
- Certification that the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to termination of parental rights were explained. 25 U.S.C. § 1913(d)
- Certification that the parent understands that he/she may withdraw consent to termination of parental rights for any reason prior to the entry of the final decree of termination of parental rights and that the child will be returned to the parent. 25 U.S.C. § 1913(c); 25 C.F.R. § 23.125(b)(2)(ii)

If termination of parental rights was uncontested because the parent failed to appear, or appeared but neither contested nor consented to termination, treat it as a contested termination.





viii.

**ADOPTION
HEARING**





viii. ADOPTION HEARING

WHO SHOULD ALWAYS BE PRESENT AT THE UNCONTESTED ADOPTION HEARING:

- Judge;
- Adoptive parents;
- Caseworker, if one was assigned;
- Tribal caseworker or representative;
- GAL/CASA or advocate for the child;²⁰
- Court reporter or suitable technology; and
- The child.

WHO SHOULD ALWAYS BE PRESENT AT THE CONTESTED ADOPTION HEARING:

- Judge;
- Prospective adoptive parents;
- Assigned caseworker;
- Agency attorney;
- GAL/CASA or advocate for the child;
- Tribal representative and/or attorney;
- Parties contesting the adoption (including Indian custodian if there is one);

- Attorneys for all parties;
- Court reporter or suitable technology; and
- Security personnel.

WHO MAY ALSO BE NEEDED AT THE CONTESTED ADOPTION HEARING:

- The child;
- Interpreter;
- Judicial case management staff; and
- Other witnesses, including tribal elders, members of the child's extended family, and other tribal members.

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) 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. *Id.*

²⁰ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.



KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child’s tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)

THE COURT’S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine whether the child is within the exclusive jurisdiction of a tribe because the child either resided or was domiciled on a reservation or is already a ward of a tribal court, thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Determine whether all the necessary consents to adoption have been provided, including the consent of the agency with the custody of the child, the consent of the child (if the child is old enough that consent is required under state law), and the consent of a parent or Indian custodian whose rights have not been terminated.
- Thoroughly describe the conditions and circumstances under which parental consent to adoption was obtained. Parental consent must be executed in writing in the presence of the judge and must be accompanied by the judge’s certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood these terms. 25 U.S.C. § 1913(a)

- Certify that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to adoption in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certify that the adoption consent was not given prior to or within 10 days after the birth of the child, as the consent would not be valid under these circumstances. 25 U.S.C. § 1913(a)
- Determine whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to adoption were explained. 25 U.S.C. § 1913(d)
- Determine whether the child is placed in an adoptive home where the adopting individual is a member of:
 - The child’s extended family;
 - The child’s tribe; or
 - Another Indian family. 25 U.S.C. § 1915(a)
- If the child is not placed in one of the placement preferences established by federal law, determine whether:
 - The agency made a diligent search to locate a placement that meets the preferences established within ICWA. 25 C.F.R. § 23.2



- There is good cause not to place the child according to the placement preferences. 25 U.S.C. § 1915(a)
- If any party asserts that good cause not to follow the placement preferences exists, the reason for that belief or assertion must be stated orally on the record or provided in writing to the parties to the proceeding and the court. 25 C.F.R. § 23.132(a)
- The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is good cause to depart from placement preferences. 25 C.F.R. § 23.132(b)

If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

In addition, “(c) A court’s determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both 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; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) 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; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, 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.”

“(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.”

“(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” 25 C.F.R. § 23.132



- If the child's tribe established a different preferred placement order, ascertain whether the placement is the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. 25 U.S.C. § 1915(b) & (c)
- If the child's consenting parent evidenced a desire for anonymity, the court shall give weight to that desire in applying the preferences. 25 U.S.C. § 1915(c)
- Determine that the child is doing well in the adoptive home and that the adoptive parents have made a clear and knowledgeable commitment to care for the child on a permanent basis.
- Determine that the adoptive parents fully understand the legal and financial consequences of adoption. Review with the parents and agency the need for and sufficiency of any adoption subsidy arrangements.
- Certify that the parent understands that he/she may withdraw consent to adoption for any reason prior to the entry of the final decree of adoption and that the child will be returned to the parent. 25 U.S.C. § 1913(c); 25 C.F.R. § 23.125(b)(2)(iii)
- At contested adoption hearings, determine whether the adoption should be granted. A contested adoption hearing must be conducted with procedural fairness, and should include notice to the parties and the child's tribe even if the tribe has not yet become a party in previous stages of the child custody proceedings. 25 U.S.C. § 1912(a)
- Conclude the proceeding without undue delay, applying principles of case flow management.
- Include in the record all information about tribal affiliation of the individual's biological parents and such other information as may be necessary to protect the rights flowing from the individuals' tribal relationship. 25 U.S.C. § 1917
- Transmit a copy of the record, including the above listed information to the BIA, Division of Human Services. 25 U.S.C. § 1951(a); 25 C.F.R. § 23.140
- Order the state to maintain records in accordance with ICWA under 25 C.F.R. § 23.141.





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