

Quick Reference Sheet for State Court Personnel



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

All Child Custody Proceedings

Inquiry. Ask in every child custody proceeding (emergency, involuntary, and voluntary): “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 definition, such as:

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

Pending verification. If there is reason to know the child is an Indian child, treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child.”

Verification with Tribe and identification of “Indian child’s Tribe.” Confirm, on the record, that the agency or other party used 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), to verify whether the child is a member **or** a biological parent is a member and the child is eligible. Determine **the Indian child’s Tribe** for purposes of the Act.

Determine jurisdiction. The Indian child’s Tribe has exclusive jurisdiction over the case if the Indian child’s domicile or residence is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings **or** the child is a ward of Tribal court. A parent or Indian custodian and the Indian child’s Tribe may request a transfer of a foster-care or termination-of-parental-rights (TPR) proceeding to Tribal jurisdiction, at any stage and at any time, orally on the record or in writing. Upon such a request, the court **must** transfer unless:

- Either parent objects to such transfer;
- The Tribal court declines the transfer; or
- Good cause exists for denying the transfer.

The reasons for denial must be on the record.

A determination that good cause exists to deny transfer may **not** include the considerations listed at § 23.118(c).

Placement preferences. ICWA’s placement preferences apply in any preadoptive, adoptive, or foster-care placement (voluntary or involuntary) of an Indian child.¹ Or, if the Indian child’s Tribe has established, by resolution, a different order of preference, the Tribe’s placement preferences apply instead. Deviations from the placement preferences are permitted only for *good cause*. Good cause must be on the record and should be shown by clear and convincing evidence and be based only on one or more of the considerations listed at § 23.132(c).

A placement may not depart from the preferences:

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

¹ See ICWA’s placement preferences at 25 U.S.C. 1915 or 25 CFR §§ 23.129-131.

Involuntary Proceedings

Notice. The record must include proof that clear and understandable notice was provided to the parents (and/or Indian custodian, if any) and Tribe, by registered or certified mail, return receipt requested, of the involuntary proceeding. No foster-care-placement or TPR proceeding may be held until at least **10 days after receipt** of the notice of that particular proceeding (with extensions allowed at option of parent or Tribe).

Active Efforts. Before ordering an involuntary foster care placement or 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. Active efforts must 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 § 23.2 for the more expansive definition and examples.

Standards of Evidence.

Foster-care placement and TPR may be ordered 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* must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. The qualified expert witness may not be the social worker regularly assigned to the Indian child.

Emergency Proceedings

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; the emergency removal or placement 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 the determinations at § 23.113(e). 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;
- (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
- (3) Restoring the child to the parent or Indian custodian.

Voluntary Proceedings

A voluntary proceeding must be truly voluntary (of the parent or custodian's free will, without a threat of removal by a State agency). The provisions summarized in "All Child Custody Proceedings" on p. 1 of this guide (including, e.g., placement preferences) apply. In addition, the court must ensure the safeguards for the parent or custodian's consent and withdrawal of consent are followed. See §§ 23.125 - 23.128.